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MIXING OIL AND WATER: THE EFFECT OF PREVAILING WATER LAW DOCTRINES ON OIL SHALE DEVELOPMENT*

BY WILLIAM E. HOLLAND**

INTRODUCTION

The largest single deposit of fossil energy known to exist in the world is the oil shale formation underlying 16,000 square miles of several basin areas in Colorado, Utah, and Wyoming.[1] Known as the Green River Formation, this deposit was laid down in three lake beds in the Eocene Age.[2] It ranges in thickness from a few hundred feet to about 7 thousand feet. Even excluding beds which contain less than 10 gallons of oil per ton of shale, the formation is estimated to contain more than 2 trillion barrels of oil. Of this 2 trillion barrels, more than three-quarters of a trillion barrels are in beds containing more than 25 gallons per ton.[3] Eighty percent of the 25-gallon-per-ton shale is in the Piceance Creek Basin of Colorado, 15 percent in the Uinta Basin in Utah, and 5 percent in the Green River Basin in Wyoming. Some samples contain as much as 90 gallons of oil per ton of shale.[4] Significant parts of the formation, notably the Sand Wash Basin and the Washakie Basin, are still largely unappraised.[5]

The Green River Formation is by no means the only oil shale deposit in the United States. There are known deposits in 30 states totaling an estimated 72 trillion tons.[6] Only the Green

* This paper was awarded the grand prize in the Rocky Mountain Mineral Law Foundation Scholarship competition for 1974.

**Associate, Kutak Rock Cohen Campbell Garfinkle & Woodward, Omaha, Nebraska; B.S., 1963, University of Nebraska; B.A., 1965, Oxford University; Ph.D., 1971, Stanford University; J.D., 1974, Stanford University Law School.

[1] See map at Appendix A.

[2] Donnell, *Geology and Oil Shale Resources of the Green River Formation*, 59 COLO. SCHOOL OF MINES Q., July 1964, at 153.

[3] *Id.* at 162.

[4] *Id.*

[5] *Id.* See also map at Appendix A.

[6] University of Denver College of Law, Legal Study of Oil Shale on Public Lands,

River Formation has present commercial significance, as the other deposits are much lower in grade and quality, generally assaying below 15 gallons per ton.[7] However, there are Alaskan deposits of unknown extent but locally very rich, with up to 160 gallons per ton.[8]

Nor are oil shale deposits confined to the United States. In 1958 the Swedish Shale Oil Company, Svenska Skifferolje AB, estimated world shale deposits at 172 trillion metric tons, representing, by its estimate, 1.2 trillion barrels of oil.[9] But since that study listed U.S. reserves at only 90 billion metric tons or 618 billion barrels, it is clearly conservative. Estimates of world deposits have increased steadily since that time. An estimate in a study for the Colorado Water Conservation Board placed world reserves at nearer 500 billion metric tons, or 4 trillion barrels.[10] More recently, the U.S. government has published an estimate of known world reserves of 900 trillion tons.[11]

Even allowing for considerable error in the estimates, these figures dwarf proven petroleum reserves,[12] and they dwarf present rates of consumption. In 1972 the United States consumed approxmately 6 billion barrels of petroleum and about 22.6 billion cubic feet of natural gas, which is the energy equivalent of approximately 4.4 billion barrels of petroleum.[13] Thus, if the oil in

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April 1969, at 11 (prepared for the Public Land Law Review Commission) [hereinafter cited as Legal Study].

[7] National Petroleum Council, Committee on U.S. Energy Outlook, Other Energy Resources Subcommittee, U.S. Energy Outlook, an Interim Report: An Initial Appraisal by the Oil Shale Task Group, 1972, at 15 [hereinafter cited as Task Group].

[8] Donnell, Tailleur & Tourtelot, *Alaskan Oil Shale*, 62 COLO. SCHOOL OF MINES Q., July 1967, at 39, 41.

[9] Cameron & Jones, Inc., Water Requirements for Oil Shale 1960-1975, July 1959, at 8-9 (prepared for the Colorado Water Conservation Board) [hereinafter cited as Cameron & Jones].

[10] Legal Study, *supra* note 6, at 11.

[11] *Id.*

[12] There is considerable variation in published estimates of petroleum reserves, however. The Office of Oil and Gas of the Department of the Interior estimated in 1971 that proven U.S. reserves were 39 billion barrels and reserves in the non-Communist world were 484 billion barrels. DEPARTMENT OF THE INTERIOR, OFFICE OF OIL & GAS, 1971 PETROLEUM SUPPLY AND DEMAND IN THE NON-COMMUNIST WORLD 28-29 (1973). Charles Issawi in a study for the Center for Strategic and International Studies estimates proven U.S. reserves at 200 billion barrels and world reserves at over 2 trillion barrels. C. ISSAWI, OIL, THE MIDDLE EAST, AND THE WORLD 8 (1971).

[13] *Hearings on the President's Energy Message and S. 1570 Before the Comm. on Interior and Insular Affairs of the United States Senate*, 93d Cong., 1st Sess., ser. 93-10, at 34-35 (1973).

that part of the Green River Formation which contains more than 10 gallons per ton were totally recoverable, it would replace both petroleum and natural gas for nearly 200 years at 1972 levels of consumption.

Nevertheless, except for a few pilot projects, almost no shale oil has been produced in the United States. Apparently the only commercial production was the operation from 1890 to 1924 of a small retort by the Catlin Shale Products Company from thin beds near Elko, Nevada. This firm never earned a profit but did market fuel oil, lubricating oil, and paraffin wax.[14] Shale oil has been produced commercially in various parts of the world since 1838, with an estimated world production from 1850 to 1961 of 400 million barrels.[15] The Russians were mining up to 18 million tons of shale per year by 1970 from Estonian deposits of about 50 gallons of gasoline per ton richness.[16] But, despite scattered assertions that the absence of American production can only have been due to foot-dragging by the major oil companies,[17] it appears that there have until recently existed real economic and technological barriers to production of oil from shale. One example is Russian production: despite the richness of the deposits, at least through 1965, oil shale was never competitive with crude petroleum.[18]

The technological and economic barriers to shale oil production stem from the fact that the organic minerals in shale are not fugacious, as are petroleum and natural gas, but are bound to the rock itself. The organic matter in oil shales is called kerogen. It can be converted into oil and gas by heating the shale to about 900 degrees Fahrenheit in a process called retorting.[19] This is accomplished by either of two basic methods: mining, either underground or open pit, followed by retorting of the mined shale; or in situ retorting by burning the shale beds in place and extracting and condensing the combustion products. The resulting shale oil is a black, highly viscous substance that is difficult to pour. To make it pipelineable, shale oil must be upgraded to remove wax-forming components; nitrogen and sulfur, in which it is rich,

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[14] C. WELLES, THE ELUSIVE BONANZA 29-30 (1970).

[15] Legal Study, *supra* note 6, at 10.

[16] Cieslewicz, *Selected Topics of Recent Estonian-Russian Oil-Shale Research and Development*, 66 COLO. SCHOOL OF MINES Q., Jan. 1971, at 1, 1-5.

[17] For a compendium of these assertions, see WELLES, *supra* note 14.

[18] Cieslewicz, *supra* note 16, at 1-7.

[19] Task Group, *supra* note 7, at 9.

can be removed at the same time by conventional techniques.[20] The result is a high grade synthetic crude oil, "syncrude," suitable for refining into products equivalent to those produced from petroleum.[21]

The difficulty of separating the oil from the rock has held back oil shale production to the present time simply because known methods involved capital costs too great to allow competition with petroleum.[22] The recent rise in petroleum prices, if permanent, could remove that barrier. But there is another problem facing an oil shale industry: a problem that becomes more acute with time, rather than less—the acquisition of sufficient water. Both retorting and the upgrading process require considerable amounts of water. The Green River Formation is the only deposit in the United States of adequate size, richness, and availability to have present commercial value. It lies, however, in one of the more arid parts of the country.

The purpose of this paper is to consider the probable demand of an oil shale industry for water and the effect which existing water law doctrines will have on ability to meet that demand.

I. WATER REQUIREMENTS FOR SHALE OIL PRODUCTION

A. *Nature of Demand*

Water is required for three purposes in connection with the production of shale oil: (1) Processes directly required to produce shale oil from the rock-mining and retorting or in situ retorting; (2) upgrading the raw shale oil to pipelineable quality; and (3) municipal supply for domestic use by employees and for domestic and other use in necessary supporting economies. The third requirement does not involve water consumed in shale oil production per se, but without which production would be impossible.

There will also be a requirement for water for the further refinement of the upgraded syncrude. Since that process does not

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[20] *Id.* at 10.

[21] *Id.*

[22] The Oil Shale Task Group estimates the capital cost, at 1970 prices, of constructing the minimum plant which could take advantage of desirable economies of scale, at $524 million exclusive of land costs (based on 100,000 barrels per day production). *Id.* A recent large-scale pilot project planned by a group of oil companies to develop oil shale on federal leases in Colorado was suspended in October 1974 after the estimated cost of a complex capable of producing 46,000 barrels per day rose from $450 million in 1973 to $800 million in 1974. Cowan, *Cost Makes Oil in Shale, Tar Sands Also Distant*, N.Y. Times, Jan. 26, 1975, § 4 at 4, col. 3.

differ significantly from the refinement of petroleum, there will be no *added* requirement, and no need for the water to be available in the oil shale region. The upgraded shale oil can be pipelined and refining can be done at any convenient location. And since at significant rates of production most oil would have to be exported ultimately in order to find a market, refining is likely to occur in areas where water is more readily available.

1. Mining, Retorting, Upgrading

The production of crude shale oil by mining and ex situ retorting requires little water—about 10 gallons per barrel.[23] Mining consumption is chiefly for drilling blast-holes and as a dust palliative. Most retorting processes use water only for bearing coolant, and a small amount as steam for heating and cleaning. There is little return flow from these uses.[24]

The largest consumption of water in production of oil from shale occurs in the upgrading and refining processes. Consumption varies greatly, depending upon the process used.[25] Cameron and Jones estimated in 1959 that, including necessary electric power generation, the total water requirement for shale oil production and refining would be 50 to 100 gallons per barrel, depending upon the refining process, with 90 percent of this consumed.[26] Thus, if production were 1 million barrels per day, 100 gallons of water per barrel of oil would add up to 36.5 billion gallons per year, or about 110,000 acre-feet per year, to use the term by which water supply is normally measured. About 100,000 acre-feet per year would be consumed. Cameron and Jones in their estimate apparently use an (unstated) intermediate figure for refinery requirements and then multiply by a factor of 1.5 to cover errors in estimation. They arrive at a final estimate of 127,000 acre-feet per year diverted, 114,000 acre-feet per year consumed, on an estimated production of 1.25 million barrels of oil per day.[27] However, it is to be emphasized that this estimate is based upon the assumption that refining is done locally. It thus

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[23] Cameron & Jones, *supra* note 9, at 33.

[24] *Id.*

[25] *Id.* at 28.

[26] *Id.* Note however that refineries in the Salt Lake City area presently consume only about 30 gallons of water per barrel of crude petroleum. Gardner & LeBaron, *Some Neighborhood Effects of Oil-Shale Development*, 8 NATURAL RESOURCES J. 568, 576 (1968).

[27] Cameron & Jones, *supra* note 9, at 33.

represents a probable *maximum* requirement.[28] As noted above, there are sound reasons for refinery operations to be conducted outside the oil shale area where this is possible.

Cameron and Jones do not separately estimate the amount of water required for local upgrading only, but their estimate of total water demand including refining does correlate closely with another published estimate which gives separate upgrading and refining figures. Raymond D. Sloan, manager of the Humble Oil shale oil project, stated in addresses to the Colorado River Water Users Association in 1965 and to the Petroleum Accountants Society of Houston in 1966 that a 2 million-barrel-per-day industry would consume about 112,000 acre-feet of water per year without refining, or about 200,000 acre-feet per year if the refining operation is conducted in the oil shale area.[29] Thus, local refining could be expected to nearly double the local water requirement. Sloan also stated the figures another way: the water consumed in mining, retorting, and upgrading shale oil is about 1.2 times the volume of oil produced.[30]

> The most recent estimates of water required for shale oil production are those of the National Petroleum Council's Oil Shale Task Group, which gives a figure of 16,000 acre-feet per year for each 100,000 barrels per day produced,[31] and those published (from unstated sources) by the U.S. Geological Survey, which gives a range of from 12,150 to 18,420 acre-feet per year for each 100,000 barrels per day produced.[32] On million barrels per day, The Oil Shale Task Group estimate would require 160,000 acre-feet per year, the Geological Survey estimates 121,500 to 184,200 acre-feet per year.

Although the Task Group is not specific on this point, the estimate appears to be based upon the quantity diverted, not consumed. It includes only mining, retorting and upgrading, not refining. The estimate is thus some 50 percent higher than Sloan's. The Final Environmental Statement for the Prototype Oil Shale Leasing Program in Colorado, however, gives an estimate of

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[28] *Id.* at 31.

[29] Cited in Ely, *The Oil Shale Industry's Water Problems*, 62 COLO. SCHOOL OF MINES Q., July 1967, at 9, 10. See also Moses, *Where is the Water Coming From?*, 61 COLO. SCHOOL OF MINES Q., July 1966, at 23.

[30] Ely, *supra* note 29, at 10.

[31] Task Group, *supra* note 7, at 92.

[32] G. DAVIS & L. WOOD, GEOLOGICAL SURVEY CIRCULAR 703, WATER DEMANDS FOR EXPANDING ENERGY DEVELOPMENT 9 (1974).

consumption of 121,000 to 189,000 acre-feet per year for production of 1 million barrels per day.[33]

There has been no actual large-scale test of in situ retorting, so the water requirements are uncertain. Ely[34] states, without supporting data, that consumption for this process may be as much as twice that required for mining and retorting. But since the major consumption is in the upgrading process and not in retorting,[35] the added increment probably will not be significant, certainly no larger than differences between published estimates based upon mining and retorting.

2. Municipal

Per capita diversion of water for use in large western Colorado towns is up to 480 gallons per day, including lawn irrigation, but most towns divert about 300 gallons per capita day, of which approximately one-third is consumed.[36] It has been estimated that an industry producing 1¼ million barrels of shale oil per day will support directly or indirectly a population of about 340,000 people.[37] At 300 gallons per capita day, this population would require diversion of about 100 million gallons of water per day, or about 100,000 acre-feet per year, with consumption of about one-third.[38]

This estimate is reasonably close to other published figures. Sloan[39] states that a 2 million-barrel-per-day industry will divert 165 thousand acre-feet per year for municipal use and consume one-third of that diverted.

3. Totals

Summing the requirements for processing and for municipal use, it appears that for every increment of 1 million barrels per day of shale oil produced, there must be a diversion of not less than about 150,000 acre-feet of water per year[40] with about 85,000 acre-feet consumed. Diversion requirements could be as high as

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[33] *Id.*

[34] Ely, *supra* note 29, at 10.

[35] Cameron & Jones, *supra* note 9, at 34.

[36] *Id.* at 29.

[37] *Id.* at 34.

[38] Cameron & Jones' estimate is based on a slightly higher per capita use, and anticipates diversion of 115,000 acre-feet per year. *Id.* at 33.

[39] Moses, *supra* note 29.

[40] *See* note 29 *supra* & Cameron & Jones, *supra* note 9, at 33.

240,000 acre-feet per year, however, with consumption of about 180,000 acre-feet.[41] These two estimates bracket that made in 1953 for the Colorado Water Conservation Board.[42] The industry producing 2 million barrels per day would have required a diversion of 455,000 acre-feet per year and consumption of 290,000 acre-feet per year. (In this context it is difficult to fit the estimate of Ely,[43] which although based upon Sloan's figures comes out with a diversion of 750,000 acre-feet and consumption of 500,000 for an industry producing 2 million barrels per day.)

B. *Probable Industry Size*

The rate of consumption of water can be expected to be approximately proportional to the rate of production of oil.[44] This is true both for direct processing uses and for support industries. The absolute requirements, then, depend upon the size of the shale oil industry, which in turn depends upon market factors not yet established. Past guesses about the future of the industry have not been notable for their accuracy. It was predicted in 1959 that production would reach 1¼ million barrels per day between 1970 and 1975.[45] A committee composed of representatives of oil companies, the Bureau of Mines, and the Bureau of Reclamation based their 1953 estimates of water use on an assumed industry of 2 million barrels per day.[46] The most recent guess, that of the Oil Shale Task Group,[47] is that commercial production at an assumed "optimum economic single-plant rate" of 100,000 barrels per day will begin in 1978, and that 400,000 barrels per day will be reached by 1985. Recent developments in the crude petroleum market could act as an incentive to even greater production. But increases in the cost of production appear to have negated the higher market price at least for the present.[48]

If it is not possible to assess the probable size of even a near-

[41] Oil Shale Task Group figures at Task Group, *supra* note 7, at 92 for mining, retorting, and upgrading, combined with Cameron & Jones, *supra* note 9, at 33 for municipal use.

[42] Delaney, *The Necessity of Water Storage for the Oil Shale Industry*, 60 COLO. SCHOOL OF MINES Q., July 1965, at 111, 113.

[43] Ely, *supra* note 29, at 16.

[44] Cameron & Jones, *supra* note 9, at 27 *et seq.* & Task Group, *supra* note 7, at 92.

[45] Cameron & Jones, *supra* note 9, at 34.

[46] Delaney, *supra* note 42, at 113.

[47] Task Group, *supra* note 7, at 114-15.

[48] Cowan, *supra* note 22.

future industry with any certainty, it is possible to demonstrate the more important point: an oil shale industry capable of supplying any significant fraction of national oil demand is going to require more water than is readily available. It has already been noted[49] that 1972 U.S. consumption of petroleum was 6 billion barrels, and natural gas supplied the energy equivalent of another 4.4 billion barrels. The oil shale industry would have to produce nearly 2 million barrels per day to supply only 10 percent of the demand for petroleum alone at this level. Energy consumption in the United States has nearly doubled every 15 years in recent decades, and it has been projected that it will continue to do so.[50] Even if the rate of increase slows significantly, total energy demand almost certainly will not decline in the near future. It is thus safe to predict that if shale oil can compete at all in cost with petroleum or other energy sources, and if production is not limited by non-economic factors, it will be produced at a rate running into the millions of barrels per day. Limitation on water supply will raise the cost of shale oil to the extent that there is a market in water; shale oil production will be absolutely limited, to the extent that water law doctrines inhibit transfer of scarce water resources.

II. Water Supply and Water Laws

A. *Natural Supply*

The primary sources of surface water in the oil shale areas are the Green River in Wyoming, the Green and White Rivers in Utah, and the White and Colorado Rivers in Colorado.[51] The average yearly runoff from the White River basin over a period of 58 years (to 1968) was 458,000 acre-feet.[52] That from the Colorado River main stem to Glenwood Springs, Colorado, is 2 million acre-feet.[53] Runoff from the Green River basin is 3.92 million acre-feet at Green River, Utah.[54] There are also groundwater supplies, but these are more difficult to measure and are largely uncatalogued. However, in absolute terms it is clear that there is enough

[49] *See* text accompanying note 13 *supra*.

[50] *See, e.g.*, Task Group, *supra* note 7, at xiv, xxiii-xxv.

[51] See map at Appendix A.

[52] Cooley, *Physical Background—Oil Shale*, 59 Colo. School of Mines Q., July 1964, at 135, 136-38.

[53] *Id.* at 138.

[54] Geological Survey Water-Supply Paper 1875, Correlative Estimates of Streamflow in the Upper Colorado River Basin (1970).

water for almost unlimited oil shale development. Natural limits on water supply are not the problem.

B. *"The Law of the River"*

All of the streams in the oil shale region ultimately flow into the Colorado River above Glen Canyon Dam. They are thus subject to the Colorado River Compact,[55] which allocates the total flow of the Colorado River among seven western states and Mexico. The primary division is that between the Upper Basin states, Colorado, Utah, Wyoming, and New Mexico, and the Lower Basin states, Arizona, California, and Nevada. In 1922 the signers of the Compact assumed that a flow of 18 million acre-feet annually was available, and they allocated 7.5 million acre-feet to each of the Basins. The delivery of that amount to the Lower Basin at Lee Ferry was made a binding committment on the Upper Basin states:

> The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.[56]

But over the past 30 years, the actual flow has been little over 13 million acre-feet per year, and about 14 million per year for the 50 years since the Compact was formed.[57] The Upper Basin states have recently agreed among themselves that they can depend upon a residual amount of about 6.2 million acre-feet.[58] This includes reservoir evaporation of 700,000 acre-feet, leaving a net supply available for consumptive use of 5.5 million acre-feet.

Also to be considered is the Mexican Water Treaty, ratified in 1945.[59] Article 10 of the Treaty requires the United States to deliver to Mexico 1.5 million acre-feet annually at the border (which represents about 1.8 million acre-feet at Lee Ferry because of evaporation losses).[60]

> The Upper States claim, and the Lower States deny, that under the terms of the Colorado River Compact the Lower Basin tributaries

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[55] COLO. REV. STAT. ANN. § 37-61-101 *et seq.* (1973).

[56] *Id.* at art. III(d).

[57] *Hearings on H.R. 4671 Before a Subcomm. of the House Comm. on Interior and Insular Affairs*, 89th Cong., 1st Sess. 512 (1965).

[58] *Id.*

[59] 59 Stat. 1219; Treaty Series 994.

[60] Ely, *supra* note 29, at 14-15.

> can and should contribute to this burden to an extent which relieves the Upper Basin of any obligation to deliver additional water at Lee's Ferry for Mexico. If the Lower Basin position were sustained, the 6.2 million acre-foot residue on which the Upper States are counting would shrink to about 5.5 million, but as 700,000 acre-feet of this must be lost in reservoir evaporation, the residue available for consumptive use would be about 4.8 million at site of use.[61]

The Upper Colorado River Basin Compact of 1948[62] gives Arizona 50,000 acre-feet annually from the Upper Basin water and divides the residue on a percentage basis: Colorado, 51.75 percent; New Mexico, 11.25 percent; Utah, 23 percent; Wyoming, 14 percent. There is thus a separate limit in each state on the consumption of water, irrespective of consumption in the other states. Actual amounts available for consumption are approximately 2.8 million acre-feet in Colorado, 1.25 million acre-feet in Utah, and 0.77 million acre-feet in Wyoming.

C. *Appropriation*

The Colorado River Compacts are not the only limitations on supply in the oil shale areas. Prior users of both surface waters and groundwater are also protected by the laws. In all three oil shale states, water is the property, not of the land owner, but of the public.[63] The states allocate water rights by the prior appropriation system, under which the application of water to a beneficial use gives the user a vested right to that amount of water, subject only to conflicting rights which existed earlier. There are three areas which are especially important to oil shale development: priority of rights; "diligence"; and transfers of rights.

1. Priority

Except as modified by statute, the elements necessary to establish an appropriation right in water are an intent to appropriate, actual diversion or capture of water, and application of the water to a beneficial use.[64] Assuming that the appropriation goes forward diligently to completion, the date of the right is the date of the first act evidencing an intent to take water for a beneficial

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[61] *Id.* at 13-14.

[62] 43 U.S.C. § 617 (1970).

[63] COLO. REV. STAT. ANN. § 37-82-101 (1973); UTAH CODE ANN. § 73-1-1 (1953); WYO. CONST. art. VIII, § 1.

[64] *See, e.g.*, City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 518, 276 P.2d 992 (1954); Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940); State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (1943).

use.[65] These doctrines have been modified by statutory filing systems which make most rights a matter of public record. Under the filing statutes in Utah and Wyoming, the priority date is the date an application is filed with the state engineer,[66] and rights may be created only by filing.[67] In Colorado the date of priority for groundwater appropriations is the date of filing an application with the state engineer,[68] but no filing is required for appropriations of surface water, and the priority date is still that of the first act leading to beneficial use.[69]

The principle of prior appropriation is thus "First in time, first in right."[70] The obvious effect on any industry becoming established at this late date is that it will find water available only to the extent that it has not already been appropriated for another purpose.

According to the Colorado Water Conservation Board, "present, authorized, and committed" projects in 1967 were capable of consuming 2.4 million acre-feet, and projects pending in Congress would bring this to 2.7 million.[71] About 150,000 acre-feet of this amount was for oil shale projects. Another 100,000 acre-feet of consumption for oil shale was among 500,000 acre-feet in various states of planning. Since no oil shale plant has yet been built, even the water already committed to oil shale projects could be lost under the "due diligence" requirement.[72]

A more optimistic view of the Colorado situation is taken by the Oil Shale Task Group.[73] Based on a 1971 study, the Task Group assumes that 700,000 acre-feet per year is still uncommitted in Colorado "and possibly one-half of this can be diverted from the Colorado and/or White Rivers to the oil shale area."[74]

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[65] *See, e.g.*, Four Counties Water Users Ass'n v. Colorado River Water Conservation Dist., 161 Colo. 416, 425 P.2d 259 (1967); Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 P. 672 (1902); Moyer v. Preston, 6 Wyo. 308, 44 P. 845 (1896).

[66] UTAH CODE ANN. § 73-3-1 (1953); WYO. STAT. ANN. § 41-212 (1957).

[67] UTAH CODE ANN. § 73-3-1 (1953); WYO. STAT. ANN. §41-212 (1957).

[68] COLO. REV. STAT. ANN. § 37-90-109 (1973).

[69] *Id.* § 37-92-305.

[70] 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 396 (1971).

[71] Ely, *supra* note 29, at 14. Moses, *supra* note 29, at 31 shows the locations of 86,000 acre-feet of consumption committed to oil shale, and lists 64,000 other acre-feet committed to "potential oil shale uses."

[72] *See* text accompanying notes 91-94 *infra*.

[73] Task Group, *supra* note 7, at 92.

[74] *Id.*

However, the report notes that most of this could be taken by 1980 by projects now under investigation for the Department of the Interior. The report also notes that the uncommitted water supply in Utah is about 350,000 acre-feet per year at present, and that in Wyoming from the Green River about 250,000 acre-feet per year, but that in both states contemplated projects may have appropriated all of this by 1980. It has been reported that the Utah Water and Power Board has filed on water from the White River for the eventual purpose of oil shale development,[75] but the amount was not stated, and diligence requirements could affect the outcome.

It is possible that in some cases unappropriated water exists where the records indicate there is none, for in all three states it is "beneficial use" which is the measure of the right, not the amount stated in an application, or given by decree, in Colorado.[76] Thus, if application is made and a permit granted for diversion of 8 cfs, but only 4 cfs is ever put to use, the right is only to the use 4 cfs. Upon proof of these facts the "paperright" may be reduced to that amount, leaving 4 cfs available for use elsewhere, if it has not already been appropriated by a second user. The potential for finding water by this means is shown by a recent Wyoming study which found that acreage actually under irrigation was only 50 to 60 percent of that allowable under previously adjudicated rights.[77] However, the same study shows that paper rights are already so much larger than supply that actual use at only a fraction of the adjudicated rates uses all available water.

Conversely, there are some rights, dating from the days before filing was required, that may not be of record.[78] These unseen icebergs lurk in the path of any present-day appropriator who needs to know what supply he can count on.

One possible means of meeting the problems posed by inflated paper rights and unrecorded real rights is illustrated by a Colorado statute adopted as part of the Water Right Determina-

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[75] Gardner & LeBaron, *supra* note 26, at 579 n.33.

[76] Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962); UTAH CODE ANN. § 73-1-3 (1953); WYO. STAT. ANN. § 41-2 (1957).

[77] McIntire, *The Dispartity Between State Water Rights Records and Actual Water Use Patterns*, 5 LAND & WATER L. REV. 23, 27 (1970).

[78] Dewsnup, *Assembling Water Rights for a New Use*, 17 ROCKY MT. MINERAL L. INST. 613, 628 (1971).

tion and Administration Act of 1969.[79] The statute[80] provides that in every even-numbered year beginning with 1974 the division engineer of each of the state's seven water divisions shall prepare a tabulation of rights and priorities in his division. He may declare abandoned any right not fully applied to a beneficial use. The list is to be published and a copy mailed to every owner of a right. Protests may be made, and a revised list is then filed with the state district court. After a period for further protests, the "water judge" of the court conducts hearings on the filed list and enters judgment and decrees on the rights. Failure to use a right for a period of 10 years creates a rebuttable presumption that it has been abandoned.

This procedure will serve to rescind known rights which are not being used and to confirm known rights which *are* being used. The same purpose is served to some extent by statutes of the other two states which declare that water rights are voided through abandonment by non-use for a period of 5 years;[81] but the Colorado procedure has the advantage of requiring a continuing review of the status of all rights. The Colorado procedure could also void unfiled rights. However, that has not been held to be the effect of the statute, and it was probably not intended, since the other provisions of the Act do not require filing in order to acquire a right to appropriate.[82]

In all three states groundwater is subject to appropriation just as surface water is, although the terms may differ somewhat from those for surface water because of the different nature of the supply. Here all three states require permits from the state engineer before appropriation may begin.[83] Both Colorado and Wyoming have statutes allowing administrators to control groundwater use in certain circumstances. In Colorado a state groundwater commission has authority to determine "designated groundwater basins" in which immediate regulation of pumping is necessary.

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[79] COLO. REV. STAT. ANN. §§ 37-92-101 to -02 (1973).

[80] *Id.* § 37-92-402.

[81] UTAH CODE ANN. § 73-1-4 (1953); WYO. STAT. ANN. § 41-47 (1957).

[82] *See* COLO. REV. STAT. ANN. § 37-92-305 (1973). The question of whether such a voiding of unfiled rights would be a taking of property inconsistent with due process will not be discussed here.

[83] *Id.* § 37-90-107; UTAH CODE ANN. § 73-1-4 (1953); WYO. STAT. ANN. § 41-122 (Cum. Supp. 1973). Bullock v. Tracy, 4 Utah 2d 370, 294 P.2d 707 (1956), holds that underground waters are subject to appropriation on the same terms as surface waters.

Well permits will be granted only if the commission finds that there is "unappropriated water" and that there will be no unreasonable injury to vested rights.[84] Outside these basins, the application for a well permit is filed with the state engineer, who may issue a permit if he finds that the well will not injure vested rights.[85] The Wyoming provisions are similar. A state board of control has power to designate "control areas" in which use is equal to recharge, or the groundwater level is declining, or conflicts are foreseeable between users, or waste may occur, or in which any other condition requires protection of the public interest.[86] Within the control areas, a permit for appropriation of underground water may be granted after a public hearing and a finding by the state engineer that there are unappropriated waters and that the use will not be detrimental to the public interest.[87] Outside of the control areas, the state engineer must grant a permit for any beneficial use unless he finds it not in the public interest.[88]

"Unappropriated waters" in these statutes is not defined. The term of course cannot mean any water not already used, since any well that would not be a dry hole would then have to be allowed. In Wyoming it probably means waters which may be withdrawn without drawing down the water table, since any area in which use is equal to or greater than recharge is included among the control areas. However, other states have allowed appropriation from non-recharging basins, up to a set rate of drawdown per year.[89] Whatever the exact definition of the term, it seems safe to assume that the massive appropriations needed to support a large oil shale industry would not be permissible from an area in which groundwater withdrawal is already so closely regulated.

It should be noted that the doctrine of priority may apply to groundwater in a slightly different manner from its meaning with respect to surface waters. Where surface water is limited, junior appropriators' supplies are progressively shut off, beginning with the most recent, until only those more senior appropriators are

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[84] COLO. REV. STAT. ANN. § 37-90-107 (1973).
[85] *Id.* § 37-90-137.
[86] WYO. STAT. ANN. § 41-129 (Cum. Supp. 1971).
[87] *Id.* § 41-140.
[88] *Id.* § 41-142.
[89] *E.g.*, Mathers v. Texaco, Inc., 77 N.M. 239, 421 P.2d 771 (1966).

left whose use equals the supply. In the situations described above where wells are drawing from a groundwater supply, new wells are allowed until use equals recharge or the allowable drawdown rate, and no new wells are subsequently allowed. Thus there are only "senior appropriators" and no juniors. Nevertheless, where over-appropriation has already occurred, the administrator may limit pumping by junior appropriators to protect senior rights.[90]

2. "Diligence"

The filing of applications for water will not necessarily secure a water supply even if water remains unappropriated. Applications which are not diligently pursued will not give rise to a right to water. In the absence of statute "due diligence" is an issue of fact, and the meaning of the term in any given case is therefore determined through the judicial process. Filing statutes have affected this procedure to some extent in all three states.

In Colorado, since there is no filing requirement for rights in surface water and all rights are decreed in special court adjudications,[91] diligence with respect to those rights is still a question for the courts. With respect to well permits within designated groundwater basins, the groundwater commission grants conditional permits to appropriate, which become final upon completion of construction if all conditions are complied with.[92] There is no express time limit placed upon construction, but it is apparently envisaged that such a limit will be one of the conditions set. Permits for wells outside the designated groundwater basins expire 1 year after issuance if beneficial use has not occurred, but the permit may be renewed for not more than 1 additional year.[93] Thus, for groundwater the court's finding is replaced by the administrator's discretion; and in most cases that discretion is strictly limited: most groundwater appropriations cannot date back more than 2 years before actual use.

Since the lead time needed to establish an oil shale production facility is at least 2 years,[94] and since most associated munici-

[90] COLO. REV. STAT. ANN. § 37-90-111 (1973); WYO. STAT. ANN. § 41-132 (Cum. Supp. 1973).

[91] COLO. REV. STAT. ANN. §§ 37-92-302 to -305 (1973).

[92] *Id.* §§ 37-90-107, 108.

[93] *Id.* § 37-90-137.

[94] The Oil Shale Task Group assumed engineering and construction would require 3 years. Task Group, *supra* note 7, at 121.

pal uses must develop over an even longer period, it is clear that groundwater supplies for oil shale cannot be reserved in advance in Colorado. Whether judicial definitions of diligence or administrative discretion offer any greater hope will be discussed below.

In both Utah and Wyoming an application must be filed with the state engineer before any right of appropriation will arise. Both states also set a limit on the time within which actual use must occur after application to the engineer, but the effect in both instances is to leave the real limit to the discretion of the engineer.

In Utah the initial time limit is set by the engineer, apparently in his discretion, as the statute offers no criteria for his guidance; and he may extend the time "on proper showing of diligence or reasonable cause for delay" for up to 50 years from the date of application![95] In Wyoming, construction of works for surface appropriations must be completed within 5 years, or any shorter time set by the engineer,[96] and for appropriations for underground water use must begin within 3 years.[97] However, the engineer may grant unlimited extensions "for good cause shown."[98]

The statutory grants of discretion are not unlimited, and they should not be construed as granting power to extend time indefinitely as a means of reserving water, whether for oil shale development or any other use. The original purpose behind the prior appropriation doctrine was to *prevent* reservation of water which could not be put to immediate use.[99] The Utah statute's reference to "diligence" indicates an intent to maintain the court-developed standard, which in one much-quoted case was said to consist of

> that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs,—such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time.[100]

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[95] UTAH CODE ANN. § 73-3-12 (1953).
[96] WYO. STAT. ANN. § 4-206 (Cum. Supp. 1973).
[97] *Id.* § 41-142.
[98] *Id.* § 41-206.
[99] *See* Dewsnup, *supra* note 78, at 616.
[100] Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 546, 97 Am. Dec. 550, 555 (1869).

Whatever the exact limits of the engineer's discretion may be in either state, they probably could not be held to extend to cases in which an oil shale lessee had filed for water on a lease which he was maintaining by payments but by no labor which would actually advance production of shale oil. In the convincing Utah case of *Carbon Canal Co. v. Sanpete Water Users Association*,[101] the Utah Supreme Court held that the state engineer could not grant further extensions of time to an appropriator whose only showing was that his project was feasible, where nothing had been done to put it into effect for nearly 40 years after the initial filing, not because of construction difficulties but because of delay in financing. The court stated that such "procedural stagnation" should not be allowed to prevent others from using water. (The fact that extensions *had* been granted for nearly 40 years is not an indication that developers can or do actually reserve water for such periods. The existence of a permit in such circumstances might only give the holder a false sense of security: a large-scale appropriation for oil shale might go unchallenged for years if it existed only on paper, but it would almost certainly be challenged by holders of conflicting rights if attempts were made to put it into effect. The question then is whether it could survive court review. *Carbon Canal Co.* indicates that it could not.)

3. Transfer of Rights

Where unappropriated waters cannot be found, water may be acquired by acquisition of existing appropriation rights. All appropriation states consider water rights at least in theory to be property and therefore saleable and transferable by other means.[102] Rights may be transferred in all three of the oil shale states, at least in some circumstances.[103] Most transfers may be expected to be by purchase. Other means, such as loans and exchanges are possible, just as they would be with any other property right; but administrative approval may be required.[104]

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[101] 19 Utah 2d 6, 425 P.2d 405 (1967).

[102] Trelease, *Changes and Transfers of Water Rights*, 13 ROCKY MT. MINERAL L. INST. 507 (1967).

[103] *See, e.g.*, Arnett v. Linhart, 21 Colo. 188, 40 P. 355 (1895); Salt Lake City v. McFarland, 1 Utah 2d 257, 265 P.2d 626 (1954); Hunziker v. Knowlton, 78 Wyo. 241, 322 P.2d 141 (1958).

[104] *See* COLO. REV. STAT. ANN. § 37-83-105 (1973) (authorizing loans for a limited time upon notice to water commissioner); WYO. STAT. ANN. § 41-5 (Cum. Supp. 1973) (authorizing state engineer to approve petitions for exchanges).

However, since oil shale needs are year-round and permanent, loans are not likely to be much used; and exchanges involve no problems fundamentally different from those raised by purchase. Therefore only purchases will be discussed in detail here.

The importance of water to the economy of arid states quickly led to its transfer being hedged about with legal and administrative precautions, so that under existing doctrines transfer is subject to a number of difficulties. The major barriers are those involving protection of junior appropriators, seasonal rights, appurtenance of water rights to land, and preferred uses.

a. *Protection of Junior Appropriators*

One hurdle which the states have erected in the path of a would-be purchaser in an attempt to protect other users is a requirement of administrative approval of certain transfers. Utah statutes require approval of the state engineer for any permanent change in the place of diversion or use, though not for a change in the use itself if the location remains unchanged.[105] Nearly all water rights purchased for oil shale use must involve a change of place of use, if not of diversion, since existing uses in the oil shale areas (except perhaps existing municipal uses, which are unlikely to be purchaseable) are unlikely to apply a large enough quantity of water in the desired area. Wyoming statutes require permission of the state board of control for any change in the use or place of use.[106]

Alongside the administrative protections there exists a judicial doctrine that vested water rights must be protected in any transfer. The problem arises in the following manner. Few uses of water consume all the water which is diverted. The unconsumed portion which returns to the stream is called "return flow." This flow is then subject to appropriation by other users. Thus, if an irrigator diverts 8 cfs, of which 4 cfs finds its way back to the stream, that 4 cfs will augment the flow downstream and can be diverted a second time. The downstream appropriator acquires a right to this 4 cfs, and his right must be protected. If the upstream irrigation right is sold to an industrial user, still with the same place of use, who diverts the same 8 cfs but consumes 7 cfs, the downstream user is damaged by the loss of 3 cfs

[105] UTAH CODE ANN. § 73-3-3 (1953).

[106] WYO. STAT. ANN. §§ 41-4, 4.1 (Cum. Supp. 1973).

to which he has a vested right.

The same problem may arise with a change in place of use. If on the same stream there is a third appropriator, upstream from our irrigator and possessing a right junior to his, when the stream flow is only 8 cfs, the upstream junior cannot consume any water because the irrigator has a right to divert all 8 cfs. But if flow is above 8 cfs, the upstream junior may divert (within the extent of his right) whatever amount will return a flow of 8 cfs to the stream. If the upstream junior has a right to divert 16 cfs, of which he consumes half, and the stream flow is 16 cfs, he can divert his full amount without interfering with the senior right. But if the senior right is transferred upstream from this second junior, and the flow remains 16 cfs, diversion of 8 cfs under the senior right with a return flow of 4 cfs will leave only 12 cfs in the stream, and the second junior will be injured.[107]

In order to protect the junior appropriators in such situations, transfer of the senior right is prevented. Courts have ameliorated the limitation by allowing transfers of part of the right, to the extent that no other user would be harmed. The same result is directed by statute in Utah, where the state engineer is directed to approve changes in part, if that may be done without impairing vested rights.[108] Thus in *Green v. Chaffee Ditch Co.*[109] an irrigator owned an adjudicated right to divert 16 cfs during the irrigation season. He sold this right to the City of Fort Collins for municipal use, and the city converted the right to a storage right. Upon protest by other users, the court found that the irrigator had never diverted more than 8 cfs, and furthermore that he diverted a maximum of 360 acre-feet per year for a use which was 25 percent efficient (75 percent return flow), with a resulting consumption of 95 acre-feet per year. The city, however, returned only 50 percent of its diversions to the stream. The city's right was therefore reduced to a maximum of 8 cfs rate of flow, and a total yearly flow of 19 acre-feet, to achieve a consumption of 95 acre-feet. This flow could be diverted and stored only during the period April 15 to October 15, the period in which the irrigation right could be used. The seller, then, was found to have owned only

[107] For a case discussing both of these changes (and disallowing them), see Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910).

[108] UTAH CODE ANN. § 73-3-3 (1953).

[109] 150 Colo. 91, 371 P.2d 775 (1962).

one-half of his paper right, and the purchaser was able to divert only one-half of that.

Purchase of existing rights for oil shale development is likely to involve both of the problems which the City of Fort Collins faced in *Chaffee Ditch*. The major problem is that most existing rights in the oil shale areas are for irrigation, a low-efficiency use with return flows of 75 to 90 percent. Oil shale production is a much more efficient use. Most estimates are that over 60 percent of total diversions will be consumed; and direct processing and upgrading uses will consume 90 percent of the water diverted to them.[110] An oil shale processor with 90 percent efficiency buying rights from irrigators who had 10 percent efficiency would have to purchase rights to 90 cfs in order to divert only 10 cfs! (The irrigator would return 9 cfs and consume 1 out of every 10 diverted. But the oil shale processor will consume 9 and return only 1. Since he *must* return the full 9 cfs for every 1 he diverts, he must purchase 9 times the amount he actually requires and divert only 1 of the 9. The others he must send down the stream.) The only possible way to avert this difficulty is for the oil shale processor to purchase the right of every user who has appropriated any part of the return flow from the water rights he has purchased, except those uses which do not add up to more than his own direct return flow. This will probably significantly affect the price he must pay. The price of prior rights can be expected to be somewhere between their value for irrigation and that for oil shale processing. The latter is presumably higher, or there will be no sale. But if the processor need purchase only a few rights, the price can be expected to be nearer the value for irrigation, since the purchaser can always go elsewhere if one irrigator will not sell. If the processor must purchase a large fraction of the existing rights in order to acquire a sufficient supply, the price can be expected to approach the value of water in *his* use, *i.e.*, the price which would raise the total price of shale oil above the market level, since every seller knows that the buyer will probably be forced to deal with him eventually. The fact that the buyer need not purchase 100 percent of the rights keeps this from being a classic "holdout" problem; but if the buyer needs any significant proportion of the total flow of the stream, sufficient concerted action can easily arise to affect the price he must pay for rights.

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[110] *See* text accompanying notes 25-28 *supra*.

b. *Seasonal Rights and Storage*

Oil shale developers seeking to purchase existing rights will also face the other difficulty illustrated in *Chaffee Ditch*: many existing water rights are seasonal.[111] Purchase of these rights gives the purchaser a right to divert water only during the period allowed under the original use.

Oil shale is not a seasonal industry. The high capital investment required would make it uneconomical to shut down production during periods of low water availability. Thus it would be necessary to follow the procedure of the City of Fort Collins in *Chaffee Ditch* and smooth out the supply by storing water during the irrigation season and using it during the remainder of the year. In theory, this does not present any insuperable difficulties. In all three states a storage right is an appropriative right, to be acquired like any other; and conversion of existing rights to storage can be done while retaining the original priority dates.[112] However, acquisition of storage rights as well as other water rights has already been going forward for many years, with the result that the most economically-feasible storage sites have already been put to use, and also with the result that off-season flows in many cases have already been fully appropriated for storage for irrigation.[113]

Some storage rights have been acquired by oil companies for oil shale uses,[114] and the companies probably will be able to share storage in public works reservoirs in other instances,[115] especially since public works reservoirs typically include a large allocation for unspecified municipal and industrial uses.[116]

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[111] A basic part of the appropriation right is the period of use. *E.g.*, Cache La Poudre Res. Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 P. 331 (1898); Hardy v. Beaver County Irrig. Co., 65 Utah 28, 234 P. 524 (1924).

[112] Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962); UTAH CODE ANN. § 73-3-2 (Supp. 1973); WYO. STAT. ANN. §§ 41-26 to -46 (1957).

[113] This has occurred, for example, on the Sevier River in Utah, where year round storage rights take the entire flow of the stream for use during the irrigation season. Dewsnup, *supra* note 78, at 623.

[114] Cooley, *supra* note 52, at 138.

[115] Balcomb, *Availability of Water for Oil Shale Development*, 63 COLO. SCHOOL OF MINES Q., Oct. 1968, at 109; Delaney, *supra* note 42.

[116] *See* the projects listed by Balcomb, *supra* note 114; Delaney, *supra* note 42; Moses, *supra* note 29.

c. *Appurtenant to Land*

It was established early throughout most of the West that appropriative rights to water were appurtenant to the land upon which the water was used.[117] However, the general rule now is that, whether or not the right is "appurtenant" in theory, it may be transferred separately from the land. The rule has long been established in Colorado since the case of *Strickler v. City of Colorado Springs*.[118] In Utah water rights appurtenant to land have been made separately conveyable by statute.[119] In Wyoming the situation is somewhat more complicated. A Wyoming statute still declares that "water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority."[120] In unadulterated form such a statute would obviously make it impossible to develop oil shale production by means of purchased rights to water. Nonetheless, enough statutory exceptions have crept in over the years that separate conveyance of water rights for oil shale should be possible. Storage rights are now excepted from the appurtenance requirement,[121] as are rights which are changed to an "industrial" use or other preferred use.[122] Thus the transfer contemplated—purchase of irrigation rights for use in oil shale processing or allied municipal uses—should present no problem. One example of such a change was the purchase of four irrigation rights for use in a taconite mill in Wyoming:

> The water supply for the mill was to be drawn from Rock Creek, and a small reservoir was constructed above the mill site. Water could be stored in this reservoir without too much interference with the rights of other appropriators on Rock Creek, but Rock Creek is a tributary of the Sweetwater, upon which a large number of ranchers depend, and the Sweetwater is itself a tributary of the North Platte, which is fully appropriated. The steel company purchased four irrigation water rights totaling approximately ten cubic feet per second from ranchers on the Sweetwater above the confluence with Rock Creek. The method of operation is to store Rock Creek water in the reservoir during the period when these water rights would have originally permitted the withdrawal from the Sweetwater. The ditches

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[117] 1 W. HUTCHINS, *supra* note 70, at 454-55.
[118] 16 Colo. 61, 26 P. 313 (1891).
[119] UTAH CODE ANN. § 73-1-10 (1953).
[120] WYO. STAT. ANN. § 41-2 (1957).
[121] *Id.* § 41-37.
[122] *Id.* §§ 41-2, -3.
[123] Trelease, *supra* note 102, at 517-18.

> on the formerly irrigated land are closed so that the ten feet formerly diverted are left in the stream to replace the water being retained by the dam on Rock Creek. Analysis discloses that the nature of the use has changed from an agricultural to an industrial use; the place of use was changed from the land on the Sweetwater to the mill on Rock Creek, the point of diversion was changed from the Sweetwater to Rock Creek; the method of use was changed from direct use to storage, and the source was changed from the main stem of the stream to a tributary.[123]

d. *Referred Uses*

A final barrier to acquisition of water for oil shale development may be raised by state laws giving preference to certain uses. A "preferred use" in effect represents a legislative or, in some cases, a constitutional decision that such a use is more valuable than any other. Such decisions were typically made so long ago that there is no discernible relationship to present-day economic values, if indeed economic value was considered at all.

The Colorado state constitution contains a clause giving preference to domestic uses of water, followed in order by agricultural uses and then manufacturing.[124] However, the Colorado Supreme Court has held that in the event a junior appropriator with a preferred use exercises his "right" over a senior inferior use, he must pay "just compensation."[125] This requirement, which is not expressed in the constitution, effectively negates the preference, since an economically less valuable preferred use will not displace a more valuable but "inferior" use.

The situation is different in Utah. That state gives preference by statute to domestic uses first and second to agriculture.[126] This statute once required that just compensation be paid if an inferior right was taken for a preferred use, but that provision was deleted in 1903.[127] The statute has not been construed by the state supreme court, although that court has said that the legislature considered these two uses to be the most beneficial to which water could be applied.[128] Thus it could be possible for an oil shale producer in Utah to find its water supply appropriated out from under it for relatively valueless agricultural uses. It might be that

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[124] COLO. CONST. art. XVI, § 6.

[125] Town of Sterling v. Pawnee Ditch Ext. Co., 42 Colo. 421, 94 P. 339 (1908).

[126] UTAH CODE ANN. § 73-3-21 (1953).

[127] Ch. 100, § 54 [1903] Utah Laws.

[128] Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

legislative action would swiftly follow any such appropriation; but legislative action beforehand would do much to ease the minds of potential investors in oil shale development.

Wyoming also has some statutory preferred uses which take priority over all others and for which others may be condemned; but "just compensation" must be paid.[129] The provision, like that of the Colorado constitution, is therefore innocuous. Furthermore, the order of preference in Wyoming is (1) Drinking water "for both man and beast;" (2) municipal; (3) railway use, laundry, bathing, refrigeration, and steam power plants; and (4) industrial uses.[130] The last could presumably be construed to include oil shale production, just as it included taconite ore processing in the Rock Creek-Sweetwater change described above; and much of the water requirement for shale oil production will be for expanded municipal uses and other of the preferred uses. Therefore the Wyoming preference system should if anything be beneficial to a shale oil industry.

D. *Water Delivery Rights*

One escape which has been suggested from the complications involved in the transfer of appropriative rights is the purchase of water *delivery* rights.[131] These are not appropriative rights, but simply contract rights, analogous to the right of a homeowner to receive domestic water from a municipal water company. Various forms of mutual, public, and privately-owned commercial water supply enterprises exist throughout the West.[132] They are alike in that the enterprise has a supply of water which it delivers to individual subscribers or stockholders. What the user has is a right to receive delivery of a share of the supply as long as he pays his water rent or owns a share of stock, while the "appropriative right" belongs to the enterprise as a whole. In the simplest case, the enterprise will own only one appropriation right, the water from which is divided among its users in proportion to their payments. The enterprise could conceivably hold a number of separate rights, in which case each user would receive a prorated share of each right.

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[129] WYO. STAT. ANN. § 41-4 (1957).

[130] *Id.* § 41-3.

[131] *E.g.*, Dewsnup, *supra* note 78, at 619-27.

[132] *See* 1 W. HUTCHINS, *supra* note 70, at 550 *et seq.*

Transfers within such enterprises take place regularly, either by sale of an individual delivery right for a particular year or by sale of "shares" in the enterprise.[133] The main advantage of such transfers is that they avoid the need to consider junior rights, since transfers within the limits of the enterprise will ordinarily cancel one another out.

> If, for example, a transfer of *X*'s share to *Y* downstream, by changing the point of diversion, reduces the return flow in the area between *X* and *Y* but increases it below *Y*, the only consequence is that the intervening farmers will receive additional water to replace the missing return flow from *X*, while farmers below *Y* will receive their entitlement from the augmented return flow.[134]

This is not true where total return flow is diminished, such as when either percent consumption increases, or transfer is outside the normal return-flow limits of the enterprise.[135] It has already been noted that both of these conditions are likely to be present where irrigation rights are sold for oil shale uses. In such a case, appropriators outside the enterprise will be affected, and the transfer will raise all the problems involved in transfer of the appropriation right itself. The transfer may appear simplified in that consolidation of the numerous delivery rights under one enterprise-appropriation has already reduced the number of appropriators involved, and water taken from holders of delivery rights can be compensated by cash payments handled through the established management of the enterprise. But where the return flow from the enterprise as a whole has already been appropriated by a number of other users, the advantages may be more theoretical than real.

E. *Federal Reserved Rights*

In addition to appropriation rights, the other major class of water rights in the Western states is the federal reserved rights to water on lands which have been withdrawn from the public domain. The federal government owns 72 percent of the oil shale lands, containing an estimated 80 percent of the shale oil.[136] It has

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[133] Dewsnup, *supra* note 78, at 623 nn.16 & 17 described such transfers occurring in the operation of mutual water companies on the Sevier River in Utah, with prices for yearly water varying from $2 to $20 per acre-foot depending upon demand.

[134] C. Meyers & R. Posner, Market Transfers of Water Rights, 1971, at 35-36 (Review Draft of National Water Commission Legal Study No. 4, Final Report) [hereinafter cited as Meyers & Posner].

[135] *Id.* at 36.

[136] Legal Study, *supra* note 6, at 11.

been suggested that federal reserved rights will provide water for development of federal shale. If this does not occur, the other face of this Jekyll-and-Hyde doctrine could threaten the water supply of any oil shale development on either federal or private lands.

1. History and Extent of the Right

The extent of the federal reserved right to water has been stated as follows:

> [W]hen the public lands of the United States were set aside as national forests, national parks, and the like, there was reserved for each enclave enough of the then unappropriated water appurtenant to the lands reserved to effectuate whatever purpose the reserved lands were set aside to serve, and this constitutes a water right with a priority of the date the lands were reserved.[137]

The doctrine orginated with Indian water rights,[138] and to date almost the only applications of any importance have been for Indian reservations,[139] but it is widely hoped or feared that it will have an effect well beyond its beginnings. Such hopes and fears must be strengthened by the allusion of the U.S. Supreme Court to "naval petroleum and oil shale reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservations were made."[140]

In the case which established the right, *Winters v. United States*,[141] the Supreme Court held that an Indian tribe whose reservation was established by treaty with the United States was the beneficiary of an implicit right to withdraw from streams upon the reservation sufficient water to sustain them in the way of life contemplated by the treaty. This water is exempt from appropriation under state laws and is subject only to the rights of appropriators whose use predated the treaty.

In *Arizona v. California*[142] the Court extended the reserved right to Indian reservations created by Executive Order and to other federal reservations. The Court upheld the Master's conclu-

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[137] Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MT. MINERAL L. INST. 579, 582 (1972).

[138] Winters v. United States, 207 U.S. 564 (1908).

[139] The major cases are discussed in Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MINERAL L. INST. 631 (1971).

[140] United States v. District Court in and for Water Division No. 5, 401 U.S. 527, 529 (1971).

[141] 207 U.S. 564 (1908).

[142] 373 U.S. 546 (1963).

sion as to quantity of water reserved for Indian use: "He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[143] And the Court upheld his finding that there was intended to be reserved "water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[144]

While it has been said that the "practicably irrigable acreage" standard of *Arizona v. California* settles once and for all the question of the scope of Indian water rights,[145] it of course cannot do so for other reservations where irrigation will never be carried on, such as game refuges and national forests. The Court did not bind itself to that standard, but merely upheld the Master's finding on intent at the time of the reservation. The holding is consistent with the dictum in *United States v. District Court in and for Water Division No.5*,[146] which looks to the original purpose of the reservation to determine the use for which water may be taken. We must thus fall back upon the "purpose of the reservation" as the only true guide. With respect to oil shale the relevant question becomes whether development of oil shale could be considered within the purposes of the reservation upon which the water is to be used.

2. Nature of Reservation

Federal reservations of land have been made for a number of purposes throughout the Western states. *Arizona v. California* considered not only Indian reservations, but also a national recreation area, two wildlife refuges, and a national forest. Another court[147] has considered reserved rights for a military reservation; and the Supreme Court has suggested that the doctrine applies

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[143] *Id.* at 600.

[144] *Id.* at 601.

[145] Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MT. MINERAL L. INST. 669, 683 (1971).

[146] 401 U.S. 527 (1971).

[147] Nevada *ex rel.* Shamburger v. United States, 165 F. Supp. 600 (D. Nev. 1958). A naval ammunition depot was created by executive order. The order made no mention of water rights, but the court held that the United States need not secure a state permit to drill a well even though there would be interference with the water supply of a nearby town.

to naval oil and petroleum reserves. There are also important withdrawals of land for grazing districts, reclamation districts, public springs and waterholes, stock driveways, coal, and for classification of lands.[148]

Although there appears to be no reason why water could not be reserved in connection with any of the above, some of these withdrawals—grazing, stock driveways, wildlife refuges—appear to offer no reasonable argument that mining or oil shale development was envisaged as a purpose of their creation. The same may be said of public springs and waterholes, specifically withdrawn for the purpose of insuring public access to stock watering places. Use of the water for oil shale production would be contrary to that purpose.

Similarly, withdrawals of military reservations may give rise to a right to waters for use by military personnel or for service-related purposes,[149] but probably not for oil shale development. If, for example, a bombing range is created, it is difficult to infer an intent to develop minerals on that site.

Several kinds of withdrawals of land *do* offer an argument that water was reserved for mineral development.

a. *National Forests*

National forests are the most important federal land reservation in terms of area or of water availability. Forest service lands, including national parks, yield approximately 59 percent of total annual runoff from the 11 coterminous western states.[150] In Colorado they contribute 94 percent of the total natural runoff.[151] Oil shale lands occur within national forests in all three oil shale states.[152]

Creation of national forests was authorized by Congress in 1891,[153] and in 1897 an act was passed limiting their creation to the following purposes:

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[148] Legal Study, *supra* note 6, at 78-84.

[149] Nevada *ex rel.* Shamburger v. United States, 165 F. Supp. 600 (D. Nev. 1958). The only purpose stated in the withdrawal order in that case was "for the development of and use as an ammunition depot."

[150] PUBLIC LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND 141 (1970).

[151] C. Wheatley, Jr., Study of the Development, Management and Use of Water Resources on the Public Lands, 1969, at 405 (prepared for the U.S. Pub. Land L. Rev. Comm'n.).

[152] Legal Study, *supra* note 6, at 83.

[153] 16 U.S.C. § 471 (1970).

> [T]o improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . . .[154]

It seems doubtful that "the purpose of securing favorable conditions of water flows" could by itself be construed to indicate an intent to reserve water. Some *use* for the water is surely necessary. If the only use for water, the only purpose in "securing favorable conditions of water flows," is to raise timber, the phrase is redundant. Statutes are normally construed to avoid redundancy. And the structure of the language clearly makes "water flows" an alternative purpose to protection of the forests, not a subcomponent.

It may be that uses for the water which would give meaning to the phrase "securing favorable conditions of water flows" are those found in the further provisions of the 1897 Act:

> All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.[155]

If this section does state uses for which "favorable conditions of water flows" are to be preserved, then mineral development is one of the purposes for which a forest may have been reserved, in the absence of any specific provision to the contrary in the Executive Order creating each forest. Traditionally, Forest Service policy has been to allow mining.

On the other hand the phrase "securing favorable conditions of water flows" could refer to water flows outside the forest as well as within. (For example, it could be argued that the purpose of having the forest is to preserve the watershed rather than reserving the water supply to preserve the forest.) In that case, one could not infer an intent to reserve water for mineral development.

There is no clear choice between these possible readings of the statute. But the fact that the Congress which enacted a statute delimiting the purposes for which national forests could be created also stated that water within them could be used for

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[154] *Id.* § 475.
[155] *Id.* § 481.

mineral development is at least some evidence that water was intended to be reserved for that use.

b. *Naval Oil Shale Reserves*

The lands withdrawn expressly as oil shale reserves are in a different category with respect to reserved water rights. Here there can be no doubt that the purpose of the reservation was to insure that oil from shale would be available in time of need. Even though the withdrawal order itself does not mention water, it is clear that water is necessary to fulfill the purpose of the reservation. The Secretary of the Navy is authorized to explore, prospect, conserve, develop, use, and operate naval petroleum reserves in his discretion, including

> the production of . . . oil shale and products thereof whenever and to the extent that the Secretary . . . finds that it is needed for national defense and the production is authorized by a joint resolution of Congress.[156]

Oil Shale Reserves No. 1, in Colorado, and No. 2, in Utah, were created by Executive Order of December 6, 1916. Reserve No. 3, in Colorado, was established by Executive Order of September 27, 1924. These are traversed by the Colorado, Green and White Rivers. The dictum of Justice Douglas in the Supreme Court's opinion in *Water Division No. 5* strongly supports the conclusion that any appropriation from those rivers subsequent to December 6, 1916, is subject to being taken for development of the oil shale reserves under the federal government's reserved water right.

c. *Oil Shale Lands Withdrawn from Leasing*

One of the most interesting questions of reserved rights arises in connection with the withdrawal by Executive Order of all oil shale lands from leasing or other disposal. The Executive Order stated:

> Under authority and pursuant to the provisions of the act of Congress approved June 25, 1910 . . . [the Pickett Act], as amended by the act of August 24, 1912, . . . it is hereby ordered that subject to valid existing rights the deposits of oil shale, and lands containing such deposits owned by the United States, be, and the same are hereby, temporarily withdrawn from lease or other disposal and reserved for the purposes of investigation, examination, and classification.

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[156] 10 U.S.C. § 7422 (1970).

> This order shall continue until revoked by the President or by act of Congress.[157]

This "temporary" withdrawal has never been revoked. Its purposes are clearly stated: investigation, examination, and classification. There is no mention of water, and, more significantly, none of oil shale development. The language of the order cannot support a construction that development was intended, and it cannot be inferred from the mere act of withdrawal as is possible for the naval oil shale reserves. One does not withdraw lands from disposal in order to develop them unless one intends to do the developing oneself; and there is no evidence that federal development of oil shale has ever been seriously considered, except for the lands reserved for defense purposes.

The expressed purposes of the withdrawal are not such as to require large quantities of water. "Minerals classification involves core drilling, surface examination, and surface mapping."[158] Thus the argument that all federal oil shale lands carry with them their own protected water supply, intriguing though it may be, must fail.

d. *Indian Reservations*

Development of oil shale or indeed any industry on Indian lands could bring the reserved rights question back where it began. There is one Indian reservation on oil shale lands, the Uintah and Ouray Reservation in Utah,[159] created under an Act of Congress in 1864,[160] for "the permanent settlement and exclusive occupation" of the tribes, who were moved there from preexisting reservations in other areas. The Act also appropriated $30,000 "for the purpose of making agricultural improvements" on the reservation, "for the comfort of the Indians who may inhabit the same." In 1902 legislation was passed to allow specific amounts of land to be alloted to each tribe member. The remaining unalloted lands were restored to the public domain.[161] In 1934 Congress enacted legislation allowing the Secretary of the Interior to withdraw the unalloted lands once again and restore them to

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[157] Exec. Order No. 5327, 29 Fed. Reg. 6655 (1916).

[158] U.S. DEP'T OF INTERIOR BULL. NO. 537, THE CLASSIFICATION OF PUBLIC LANDS 50 (1913).

[159] Legal Study, *supra* note 6, at 84-85.

[160] Act of May 5, 1864, ch. 77, 13 Stat. 63.

[161] Act of May 27, 1902, Pub. L. No. 57-125, 32 Stat. 245, 263.

the reservation, subject to valid intervening private rights and claims.[162] Under this Act, the Secretary withdrew lands in Colorado and Utah which included much of the oil shale in those states. Ultimately restoration of all lands in Colorado was blocked by Congress, but 217,000 acres of land in Utah were restored to tribal ownership in 1945. This reservation now represents the largest single tract of oil shale lands outside the Bureau of Land Management, which controls the public domain lands.[163]

The erratic history of withdrawal leaves the date, if not the extent, of federal reserved rights on the reservation somewhat uncertain. Is the date of the right 1864, 1934, or 1945? The first, obviously, would predate most other water rights in existence. However, restoration was by the Act of 1934 made "subject to intervening rights." The reference may have been to intervening rights in *land*, but it cannot be limited to those, since the federal right to water dates only from the uninterrupted reservation of the land. At least, there has been no suggestion that a second reservation may relate back to the date of an earlier one; and the Supreme Court's decree in *Arizona v. California* suggested that where lands had been made part of an Indian reservation on different dates, the priority date of the reserved water right on each part was the date of that accession of land.[164]

Whatever the date of the federal reserved right on the reservation, it obviously will predate *some* other rights, and the question will therefore arise whether that right applies to water used for oil shale development.

The question must be answered by the same "purpose of the reservation" test that applies to other withdrawn lands and was applied to the Indian reservations in *Arizona v. California*.[165] It will be recalled that in that case the right was measured by "irrigable acreage," but that in applying that measure the Supreme

[162] 25 U.S.C. §§ 461-79 (1970). The same act allowed the Secretary of the Interior to make regulations for forestry and livestock grazing but said nothing about mineral development except that it reopened the Papago Reservation in Arizona to mineral entry of all kinds, subject to lease payments to the Indians. No such provision was made with respect to the oil shale lands of the Uintah Reservation, which had been withdrawn as part of the general oil shale withdrawal. There is thus no affirmative showing that Congress considered mineral development likely on the Uintah Reservation, but there is some evidence that it had in mind the possibility of general mineral development on Indian reservations.

[163] Legal Study, *supra* note 6, at 84.

[164] 373 U.S. 546 (1963).

[165] *Id.*

Court merely upheld the finding of the Master that withdrawal of the lands was intended to reserve water only for irrigation. Arizona contended that the quantity reserved should be measured by the Indians' "reasonably foreseeable needs."[166] The Court rejected this argument, which it said,

> in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.[167]

Although the Court rejected a measure that was based upon the number of Indians, it did not say that some other measure based upon the originally contemplated use of the land would be rejected. A different measure than irrigable acreage thus could, and should, be used to measure Indian reserved water rights where it appears that the intent at the time of reservation was to have water for some purpose other than irrigation.

It probably will not be possible to conclude, as at least one writer has done,[168] that Indians may assert reserved rights to water for industrial purposes. There may be exceptional cases, but normally industrial development would not have been foreseen at the time of withdrawal of the reservation.

If there are exceptions, the Uintah and Ouray Reservation may be one of them. It cannot be seriously argued that oil shale development was foreseen and intended as a way of life on the reservation in 1864. The original act creating the reservation appears to have contemplated that the Indians would live by agriculture. But if part of the reservation dates to 1934 or 1945, the argument with respect to that part is less one-sided. The potential for development of oil shale was well known by 1934. The withdrawal of federal oil shale lands from leasing had occurred 4 years earlier. Development of oil on Indian lands had already occurred in Oklahoma.[169] A respectable argument could be made that lands reserved in 1934 or thereafter carried with them the rights to water for development by means other than irrigation, including the development of oil shale.

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[166] *Id.* at 600.

[167] *Id.*

[168] W. Veeder, Winters Doctrine Rights in the Missouri River Basin, 1965 (unpublished manuscript) cited in Bloom, *supra* note 145, at 691 & n.25.

[169] *See, e.g.*, Parker v. Riley, 250 U.S. 66 (1919), concerning Indian homestead rights in oil and gas leases granted by Indians.

CONCLUSION

Oil shale production at a rate which amounts to a significant part of national demand for oil will require more water than will remain in the unappropriated supply of the oil shale regions by the time large-scale production can begin. This means that transfers of existing rights will be necessary to allow production on that scale.

Existing water law doctrines of the oil shale states raise numerous barriers to the easy transfer of water rights. These could significantly lower oil shale production by raising the cost of water or barring transfer completely. Production could also be delayed by making it necessary to resort to court procedures in order to transfer water rights.

A few of the barriers can be easily lowered. For example, the Utah statute making agriculture a preferred right could be revoked, or a statute passed requiring compensation for the right taken if a preferred right is exercised. Other barriers will be more difficult to raze. The protection of junior rights under the appropriation system cannot be easily reversed once those rights have been granted. It has been suggested[170] that a purchaser should be granted rights in his own return flow, since there would then be no other appropriator who could object to further transfers of the right, and the cost of transfers would thus be lowered. This is quite correct. But the suggested change would do nothing to ease the first transfer where the return flow is already fully or partially appropriated.

It has also been suggested[171] that procedures should be established for forced mutualization of a water supply (similar to forced unitization of an oil field) and for auction rather than cost-free appropriation of unappropriated waters. These procedures could significantly ease the difficulty, and hence the cost, of transferring rights. Without some such radical overhaul of the water laws, water for oil shale may prove difficult to obtain.

The doctrine of federal reserved rights offers hope that a water supply sufficient for shale oil production can be obtained at least on certain lands—certainly on the naval oil shale reserves, and possibly on national forests and the Uintah and Ouray

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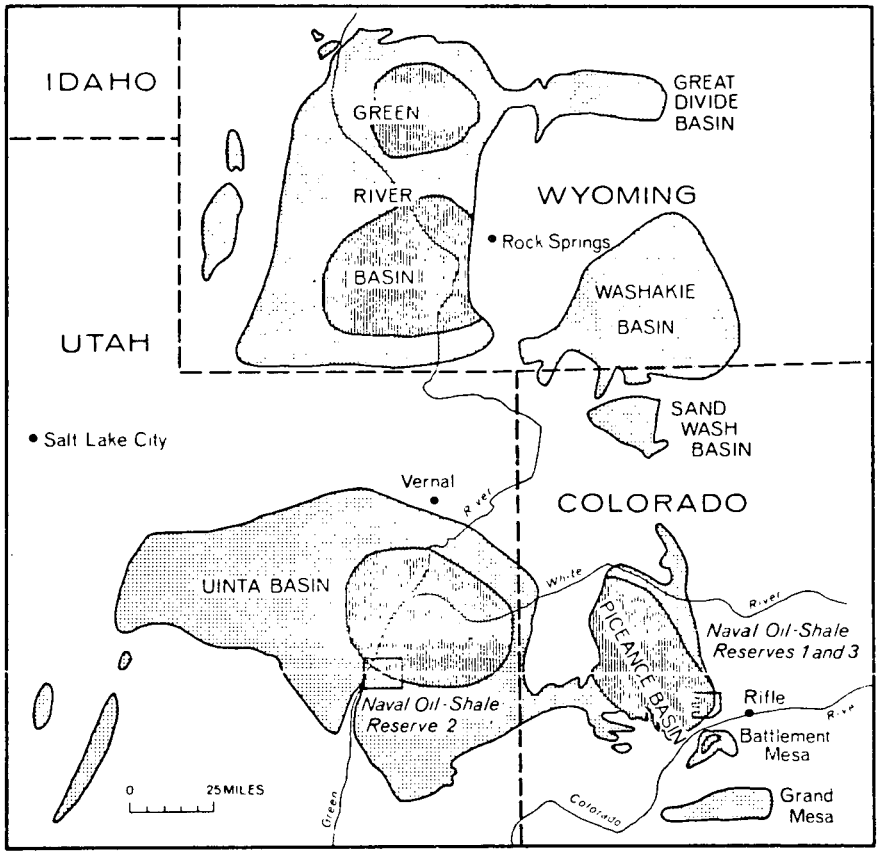
[170] Meyers & Posner, *supra* note 133, at 27-32.

[171] *Id.* at viii-ix, 37-38, 42-43.

Indian Reservation. But the doctrine is a two-edged sword. If it offers hope of development in those locations, it threatens development in others by cutting off private water rights which could be used for shale development on other lands.

At the very least, the federal reserved right should not be asserted without compensation for established rights, even where those rights are in theory subject to the federal right. Where water is already appropriated, there will be heavy political pressure not to take it from established users. An attempt to assert the right without compensation, especially for use by major oil companies, could lead to congressional reaction including abrogation of the right. Compensation might be money well invested. In effect it would amount to a means of achieving transfers of water at market value, without the additional costs imposed by the barriers to transfer in the appropriation system. That would not be the worst of results.

Appendix A



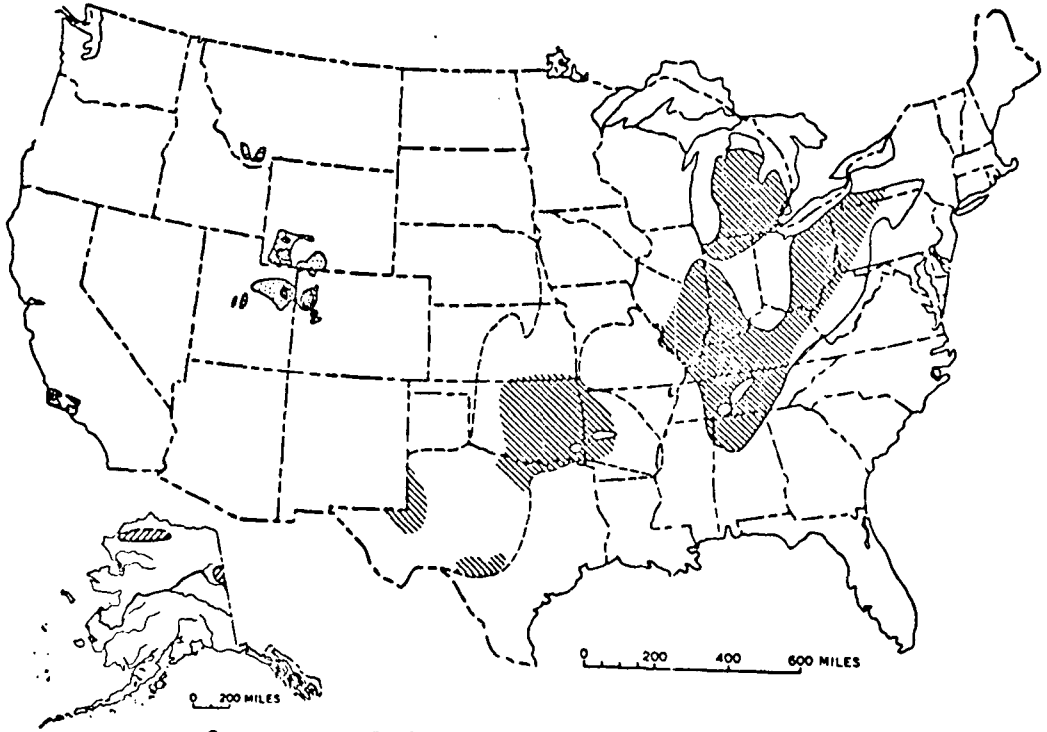
EXPLANATION

Area underlain by the Green River Formation in which the oil shale is unappraised or low grade

Area underlain by oil shale more than 10 feet thick, which yields 25 gallons or more oil per ton of shale

Source. Geological Survey Circular 523

Distribution of Oil Shale in the Green River Formation, Colorado, Utah and Wyoming.



Source - Geological Survey Circular 523

Figure 3-1- Principal reported oil-shale deposits of the United States

EXPLANATION

Tertiary deposits Green River Formation in Colorado, Utah and Wyoming; Monterey Formation, California; middle Tertiary deposits in Montana. Black areas are known high-grade deposits.

Mesozoic deposits
Marine shale in Alaska

Permian deposits
Phosphoria Formation, Montana

Devonian and Mississippian deposits (resource estimates included for hachured areas only in Geological Survey Circular 523). Boundary dashed where concealed or where location is uncertain

NOTE

PRICE FIXING ON THE CAMPAIGN TRAIL: FREE SPEECH AND EQUAL PROTECTION CONFLICTS WITH SPENDING LIMITATIONS ESTABLISHED IN THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974

INTRODUCTION

In the years 1972 to 1974, the political institutions of the United States sustained the greatest scandal in our country's 200 years of existence. Watergate brought out all that is bad in political campaign financing: Individual donors' giving large sums of money to win influence of ambassadorships;[1] a former cabinet member's serving as a bag man, collecting illegal contributions from corporations fearful of retaliation if no donation were given;[2] large, unneeded sums of money's sitting in diverse bank accounts and private safes, eventually used to finance break-ins and hush payments.[3] It was these aspects of political fundraising, as well as others, that led one prominent Illinois fundraiser to the conclusion that "fundraising is a seamy, tawdry business, but it must be done."[4]

As the costs of campaigns continue to rise, the necessity for fundraising becomes more apparent. In 1968, approximately $300 million was spent on all elections held in the United States,[5] while in 1972, the figure rose to $400 million.[6] The 1972 primary and general election candidates for the House and Senate spent $77,255,078 for the period of April 7 through December 31.[7] The

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[1] *See* TIME, April 16, 1973, at 8.

[2] *See Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate*, 93d Cong., 1st Sess. 5494-521 (1973).

[3] *See* SUBMISSION OF RECORDED PRESIDENTIAL CONVERSATIONS TO THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES BY PRESIDENT RICHARD NIXON 188-207 (1974) (March 31, 1973, meeting between Richard Nixon and John Dean) (transcripts of White House tapes).

[4] Conversation with Angelo G. Geocaris, fundraiser for Illinois Governor Daniel Walker, winter 1973.

[5] H. ALEXANDER, POLITICAL FINANCING 38 (1972).

[6] *Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 219 (1973) (statement by H. E. Alexander) [hereinafter cited as *1973 Hearings*].

[7] Common Cause Press Release, "Total Campaign Finances in the 1972 Congressional Races," Report No. 1, Sept. 13, 1973, on file with the *Denver Law Journal*.

Senate Commerce Committee in 1971 declared that one purpose of campaign reform was to "halt the spiraling cost of campaigning for public office."[8] Campaign spending seemed to be getting out of control.

These figures, however, need to be put in some perspective. The $300 million spent in 1968 represented less than one-tenth of one percent of all money spent by the government, and came to about $1.50 per citizen to elect over 500,000 political officials.[9] Proctor and Gamble in that same year spent $270 million on advertising alone.[10] These figures led Herbert Alexander, Director of the Citizens' Research Foundation and long-time advocate of campaign reform, to conclude that rather than being over priced, politics is underfinanced:

> $400 million is just a fraction of one percent of the amounts spent by governments at all levels, and that is what politics is all about, gaining control of governments to decide policies on, among other things, how tax money will be spent.[11]

While seemingly large amounts of money are spent in political campaigns, one must consider these costs in light of the educational function a campaign serves. The Committee report on the 1974 bill proposing spending ceilings cited a Harvard study suggesting that rather than too much, *not enough* money is being spent to educate the electorate.

> Watergate and related events tend to place the issue in the context of preventing excessive spending and controlling "corruption." The idea is that the less money spent, the less needs to be raised, and thus the purer the process. Completely neglected in this statement of the issue is the need for campaigns to serve the broader public purposes and currently proposed spending limits just would not permit this to be done.[12]

But the American people see otherwise. In a Gallup Poll taken in November 1972, those interviewed expressed an overwhelming desire to place limits on the amount of money in campaign coffers.[13] Two years later, the people had what they wanted.

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[8] S. REP. No. 92-96, 92d Cong., 1st Sess. 20 (1971).

[9] H. ALEXANDER, *supra* note 5, at 38-39.

[10] *Id.* at 39.

[11] *1973 Hearings*, *supra* note 6, at 219.

[12] H.R. REP. No. 93-1239, 93d Cong., 2d Sess. 152 (1974).

[13] Washington Post, Nov. 30, 1972, § A, at 2, col. 4. In response to the question, "Would you favor or oppose a law which would put a limit on the total amount of money which can be spent for or by a candidate in his campaign for public office?", the response

The Congress overwhelmingly passed the Federal Elections Campaign Act Amendments of 1974[14] (the Campaign Act of 1974), and it was signed into law on October 15, 1974. The key effects of this new law are to:

> (1) establish ceilings on the amounts an individual may contribute to any one campaign for federal office;
> (2) establish a $25,000 ceiling on the aggregate amount anyone may contribute to federal campaigns in any one election year;
> (3) establish a ceiling on the amount of personal funds a candidate for federal office may himself contribute to or spend on his own campaign;
> (4) establish limitations on campaign expenditures for congressional and presidential campaigns; and
> (5) provide for voluntary public financing of presidential primary and general elections.[15]

The first four provisions may well conflict with the first amendment guarantees of freedom of speech in that each would, to some degree, restrict the freedom of expression of both the candidates and the electorate. The fourth provision, the establishment of limitations on campaign expenditures, however, seems to be the most constitutionally infirm, both on its face and in its application.

While many in Congress expressed sincere reservations about ceilings on expenditures,[16] few voted against the bill the day it passed. This paradox is the natural consequence of a political process "filled with arbitrary compromises and responsive as in some degree it must be to . . . short run pressures . . . ."[17] One short-run pressure which must have been on the minds of the members of Congress when the final vote was taken was the un-

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was: Favor, 71%; oppose, 18%; no opinion, 11%. *Id.*

[14] The Campaign Act of 1974 passed the Senate by a vote of 60 to 16. 120 CONG. REC. S. 18,455 (daily ed. Oct. 8, 1974). It was passed by the House by a vote of 365 to 24. *Id.* at H.R. 10,344-45 (Oct. 10, 1974).

[15] Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (codified in scattered sections of 2, 18, 26 U.S.C.A.).

[16] *See generally* 120 CONG. REC. (daily ed. March 26, 27, 29; April 1-5, 8-11, 1974) (S. 3044 considered and passed by the Senate); *Id.* (Aug. 7, 8, 1974) (H.R. 16,090 considered and passed by the House); *Id.* (Oct. 8, 1974) (Senate considered and passed the Conference Rep.); *Id.* (Oct. 10, 1974) (House considered and passed the Conference Rep.); *1973 Hearings, supra* note 6; *Hearings on H.R. 7612 [and] S. 372 Before the Subcomm. on Elections of the Comm. on House Administration*, 93d Cong., 1st Sess. (Supp. 1973) [hereinafter cited as *Hearings on H.R.* 7612 (Supp.)].

[17] Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199, 220 (1971).

pleasant and politically unpopular task of having to explain to their constituents a vote against reform legislation in a campaign year dominated by corruption.

In this as in other instances, legislators' votes may result from the pressures of Gallup Polls, constituent demands, and national scandal rather than from consideration of more enduring values, such as constitutional considerations. Senator James Buckley lent support to this belief when he stated on the floor of the Senate that the constitutional aspects of the Campaign Act of 1974 were almost totally ignored by the Congress.[18] One reason the constitutional aspects are not accorded their due respect in the halls of Congress may be the result of "a feeling that because the Supreme Court has the ultimate say on most constitutional issues, other institutions of government, not to mention citizen observers, need not concern themselves with the constitutionality of legislative action."[19]

This note is directed generally at the issues a court of law must consider in passing upon the constitutionality of placing limitations on campaign expenditures, with specific references to the ceilings provided for in the 1974 Act. The discussion is limited to congressional ceilings; consideration of the issues behind ceilings on presidential campaigns is omitted.

I. SPENDING LIMITATIONS AND FREE SPEECH

A. *Speech in a Political Setting*

The Campaign Act of 1974 provides for expenditure ceilings on the amounts of money which may be spent for political campaigning in both Senate and House races.[20] The Act also contains

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[18] 120 CONG. REC. S. 5707 (daily ed. April 10, 1974).

[19] H. PENNIMAN & R. WINTER, CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 59 (1971).

[20] 18 U.S.C.A. § 608(c)(1)(C)-(E) (Supp. I, 1975).

> (c)(1) No candidate shall make expenditures in excess of—
>
> . . . .
>
> (C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 8 cents multiplied by the voting age population of the State
>
> . . . ;
>
> or
>
> (ii) $100,000;
>
> (D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a

a provision excluding from the ceilings those costs, up to 20 percent of the appropriate spending ceiling, incurred in the course of raising funds.[21] Thus, for example, a candidate for the House from a state having more than one representative, may spend in each election $84,000, *i.e.*, the $70,000 ceiling plus an additional 20 percent, or $14,000, if at least $14,000 of a candidate's expenditures have been incurred in the course of raising funds. There is, in addition, a provision in the law which ties the ceiling level to any rise in the cost of living.[22]

While the ultimate effects of a limitation on campaign expenditures may be the subject of much dispute and diverse opinion, one effect of the new law seems very clear: It results in an infringement of the freedom of speech guaranteed by the first amendment.[23]

State which is entitled to only one Representative, the greater of—

(i) 12 cents multiplied by the voting age population of the State . . . ;

or

(ii) $150,000;

(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State . . . .

[21] 18 U.S.C.A. § 591(f)(4)(H)(Supp. I, 1975).

(f) "expenditure"— . . . .

(4) does not include—

. . . .

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608(c) of this title . . . .

Id.

[22] *Id.* § 608(d)(1):

At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

[23] 120 CONG. REC. S. 5703 (daily ed. April 10, 1974) (remarks by Senator Buckley). *See also* R. WINTER, CAMPAIGN FINANCING AND POLITICAL FREEDOM (1973); Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N. CAROLINA L. REV. 387 (1973) [hereinafter cited as Fleishman]; Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359 (1972).

One reason that free speech is so greatly affected by ceilings on spending can be found in the changing nature of campaigns. A soapbox campaign, as an effective means of communicating with a large percentage of the population, has long since become obsolete. In today's complex society, wide-spread communication of a candidate's views and positions requires substantial expenditures of money for media, literature, mailings, and organization. To the degree that a spending ceiling limits these activities, a candidate's free speech—his right to communicate with the voters—has been abridged. Professor Ralph Winter has advanced the proposition that if free speech does nothing else, it protects "explicit political activity;"[24] he argues that a ceiling on spending is merely an attempt to limit this protected activity.[25]

The Washington State Supreme Court has recently struck down a state statute which established ceilings on campaign expenditures.[26] While relying on the principle of vagueness in reaching its determination of unconstitutionality, the court found a serious first amendment infringement in that a ceiling

> is fatally defective because it can operate to prohibit absolutely plaintiff and others from exercising their constitutionally guaranteed freedom of speech. The defendants argue that the section merely imposes a regulation on the amount of money which can be spent in communicating. However . . . [t]o communicate effectively with the mass of voters, one cannot be limited to verbal communication person-to-person, but must use the media in one form or another.[27]

There is also support for the argument that expenditure ceilings prohibiting one from making an individual contribution may violate one's freedom of association. *See* 120 CONG. REC. S. 18,537 (daily ed. Oct. 8, 1974) (remarks of Senator Buckley). Professor Winter has said:

> Contributions to a candidate permits individuals to pool their resources and voice their message far more effectively than if each spoke singly. This is critically important because it permits citizens to join a potential organization and propagate their views beyond their voting districts.

R. WINTER, *supra* note 23, at 64. While the Constitution makes no mention of freedom of association, it has evolved as an important element of the first amendment. The Supreme Court stated in NAACP v. Alabama, 357 U.S. 449, 460 (1958), that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *See also* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[24] H. PENNIMAN & R. WINTER, *supra* note 19, at 60.

[25] *Id.*

[26] Bare v. Gorton, 84 Wash. 2d 380, 526 P.2d 379 (1974).

[27] *Id.* at 385, 526 P.2d at 382.

In order to evaluate the degree to which the free exercise of speech is affected, it is necessary to put the infringed right in its proper milieu. This law is not aimed at speech which can be characterized as obscene, loud or raucous, inciteful, or inimical to the concepts of our democratic process. Rather, the type of speech curtailed by campaign spending ceilings forms the very basis of the responsive, democratic form of government which we have enjoyed since the founding of the nation. This speech is "the rock on which our government stands."[28]

The Campaign Act of 1974 is a legislative attempt to establish a limit on the amount of speech which may be undertaken during the course of a campaign for federal office. The words of Justice Black in *Mills v. Alabama*[29] have an unmistakable relevance to this attempt by the Congress to limit campaign debate:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course included the discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[30]

All hard fought campaigns for the U. S. Congress embrace discussions of candidates, structures and forms of government, and the manner in which government is or should be operated.

It is generally accepted that free speech is not guaranteed to all speaking.[31] However, when one speaks to the issues upon which voters must decide, speech should be afforded its greatest protection, for one of the purposes of the first amendment

> is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else . . . . The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall as far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.[32]

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[28] A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 91 (1948).
[29] 384 U.S. 214 (1966).
[30] *Id.* at 219.
[31] Schenck v. United States, 249 U.S. 47 (1919).
[32] A. MEIKLEJOHN, *supra* note 28, at 88-89.

The Supreme Court has recognized in numerous landmark cases that the high degree of protection assigned political speech is the necessary consequence of any self-government.[33] This is true not simply for the benefit of those expounding diverse ideas, nor for the benefit of candidates debating the crucial issues of any one campaign. Rather, the freedom of speech in a political setting is afforded the greatest protection for the benefit of those who must decide how to cast their votes each and every time an election is held. The Supreme Court has long recognized the importance of receiving information as the corollary to the first amendment right to freedom of speech, and has made constant references to this right.[34] Throughout the discussion of the constitutionality of spending limitations on campaigns, the right of the people to receive adequate information on which to base their votes must not be forgotten.[35]

In turning to the role of the Court in passing upon the constitutionality of the Campaign Act of 1974, it is well to keep in mind the words of Justice Brennan in *New York Times Co. v. Sullivan*.[36] Like that case, any case in which the Court considers the constitutionality of the spending ceilings will be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ."[37]

B. *The Court's Approach to Infringements on Speech*

It has been a long-acknowledged principle of law that although the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech,"[38] this is not itself an absolute prohibition against laws which may for various reasons infringe on this freedom.[39] The Court has from time to time estab-

[33] *See* Mills v. Alabama, 384 U.S. 214 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[34] *See* Bullock v. Carter, 405 U.S. 134 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mills v. Alabama, 384 U.S. 214 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. CIO, 335 U.S. 106 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943).

[35] *See* Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV., 214, 225-29 (1972).

[36] 376 U.S. 254 (1964).

[37] *Id.* at 270.

[38] U.S. CONST. amend. I.

[39] *See* Adderly v. Florida, 385 U.S. 39 (1966); Feiner v. New York, 340 U.S. 315 (1951);

lished various tests by which it can judge the alleged infringements to determine their constitutionality. Three tests have emerged as a guide for the Court: (1) the local community standards test;[40] (2) the clear and present danger test;[41] and (3) the "balancing test."[42] Each test is more or less designed as a test of a particular type of infringement in a specific context. The local community standard test has been applied to speech attacked as obscene;[43] the clear and present danger test has been used in the "regulation of subversive activity and of the publication of matter thought to obstruct justice;"[44] and the balancing test has been applied "primarily in the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise."[45]

It is clear that the establishment of ceilings on expenditures does not fit within the context of the local community standard test. The applicability of the clear and present danger test is inappropriate because excessive spending in campaigns could hardly be considered as subversive activity "believed to endanger the safety of the Nation."[46] This is particularly true in light of the Court's decision in *Brandenburg v. Ohio*,[47] which further limited this test to advocacy "directed to inciting or producing imminent lawless action and [which] is likely to incite or produce such action."[48] The imminency required by *Brandenburg* is absent in the case of excessive campaign expenditures.

It is the balancing test which is most likely to be applied by the Court in reaching a determination of the constitutionality of spending ceilings, for, at least ostensibly, the purpose of Congress in enacting the ceiling was not to limit the content, but to limit the unnecessary and excessive exercise of campaign speech.[49] One

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Kovacs v. Cooper, 336 U.S. 77 (1949); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[40] Miller v. California, 413 U.S. 15 (1973).

[41] Schenck v. United States, 249 U.S. 47 (1919).

[42] Konigsberg v. State Bar, 366 U.S. 36 (1961).

[43] Miller v. California, 413 U.S. 15 (1973).

[44] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).

[45] *Id.*

[46] *Id.* at 8.

[47] 395 U.S. 444 (1969).

[48] *Id.* at 447.

[49] *But see* text accompanying notes 121-38 *infra*.

must, therefore, scrutinize the balancing test itself, in relation to the ceilings established in the Campaign Act of 1974, to arrive at a conclusion as to the constitutionality of the ceiling.

C. *The Balancing Test*

Very simply stated, the balancing test is a weighing of the interests sacrificed against the value to society of the goals sought to be achieved by a particular act of Congress.[50] In the case of ceilings on campaign spending, the interests sacrificed are first amendment freedoms in a political setting. These must be balanced against the government's interest in the preservation of the purity of the electoral process. In *United States v. O'Brien*,[51] Chief Justice Warren summarized the nature of the requisite governmental interest as well as the degree of balancing necessary for legislative infringements on protected freedoms to survive the scrutiny of the Court:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[52]

Under this test, a legislative infringement on first amendment freedoms is likely to be upheld only if four elements are satisfied: (1) there is constitutional power to legislate; (2) an important or substantial interest is furthered; (3) the interest is unrelated to suppression of speech; and (4) the restriction on first amendment freedoms is incidental and no greater than is essential to promote the interest. Congressional power to regulate campaign spending, the first element of the *O'Brien* test, is clearly granted in article I, section four of the Constitution[53] and is also implied in the

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[50] Rosenthal, *supra* note 23, at 372.

[51] 391 U.S. 367 (1968).

[52] *Id.* at 376-77 (footnotes omitted).

[53] The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4(1).

Commerce Clause. Therefore no discussion of this element will be undertaken.[54]

1. Furtherance of a Substantial Interest

The second element of the test enumerated in *O'Brien* is that to justify legislative infringement on speech, an important or substantial interest must be promoted. Prevention of numerous evils has been advanced as the government's interest in campaign reform generally, and in ceilings specifically. The rationale for reform can generally be resolved into three catagories: (1) fear that the high cost of campaigns will lead to a dependence on a small number of large contributors; (2) fear that the inequalities which result from one candidate's having far greater financial resources will lead to a highly unbalanced presentation of candidates' views and qualities before the American electorate, and that competition among candidates will be distorted by inequality of opportunity to communicate with the voters; and (3) fear that spiraling campaign costs will deter many well qualified people from seeking office.[55] While a limitation on expenditures may appear to meet these evils head on and thus accomplish the goals, a closer evaluation reveals that a ceiling may not inhibit them at all.

a. *Candidates' Dependence on Large Contributors*

It has been suggested that a limit on spending can reduce the financial liabilities of candidates who must raise large sums of money to campaign for public office.[56] This line of reasoning is predicated on the belief that the more money a candidate spends, the more likely it is that the candidate will turn to large donors. While certainly true in a good many instances, this is by no means the universal case. The Tenth Congressional District of Illinois was the site of one of the closest as well as the most expensive House race in 1974.[57] Yet the entire amount spent was

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[54] *See* A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 12-15 (1972). *See also*, United States v. CIO, 335 U.S. 106 (1948); United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Siebold, 100 U.S. 371 (1879).

[55] *See* Rosenthal, *supra* note 23, at 360.

[56] Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640, 646 (1971).

[57] Both candidates, according to reports filed with the Clerk of the House of Representatives, spent a combined total of $537,474. Common Cause Press Release, April 11, 1975, on file with the *Denver Law Journal*. The winner received 51.3 percent of the vote.

financed by contributions limited to $3,000 per contributor.[58] Abner Mikva, the Democrat and ultimate victor, received close to half of his funds in contributions of under $100.[59]

While one need not always resort to large donors as one's spending increases, the influence of large donors would not necessarily be removed by the establishment of an expenditure ceiling. Were there no attempt to limit the size of contributions,[60] one could still receive the entire ceiling amount from large donors. Thus it is a reduction in the level of individual contributions, not the establishment of ceilings on expenditures, that will serve to eliminate the potentially corruptive effects of large donations.

Additionally, in establishing a maximum ceiling of $168,000 in a race for the House,[61] it is possible, even with a provision limiting individual contributions to $1,000 or less, that some individuals wishing to donate to the candidate of their choice may be barred by a prior attainment of the ceiling limit by the candidate. This potential turning away of donors is exactly the opposite of what is desired. According to Representative James Cleveland, "Often the act of contributing is the most direct opportunity open to the individual, beyond the act of voting, to express his will. We should preserve this, expand it, and give even greater leverage to the small individual contributor."[62] Studies show us that only 14 percent of the voters have even been asked to contribute, and only 9 percent have ever done so.[63] If the ranks of contributors are to

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[58] Both Mikva and Young adhered to a self-imposed limit of $3,000 per contributor. The Campaign Act of 1974 effectively limits the individual to a contribution total of $2,000—$1,000 in the primary, and $1,000 in the general election. *See* note 60 *infra*.

[59] Interview with Jack Marco, former campaign manager for Representative Abner Mikva, in Skokie, Ill., March 24, 1975.

[60] The Campaign Act of 1974 does provide for a ceiling on contributions:

> (b)(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.
>
> . . . .
>
> (5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

18 U.S.C.A. § 608(b)(1) & (5) (Supp. I, 1975).

[61] The candidate is allowed $84,000 for the primary and $84,000 for the general election. *See* notes 20 & 21 *supra*.

[62] *Hearings on H.R.* 7612 (Supp.), at 3.

[63] *Id.* at 9 (statement by Representative H. Johnson). *See generally 1973 Hearings*,

expand in number, the law must provide greater incentives for small individual contributions, not prohibitions against them.

The central point is this: Very few people could suggest that a candidate had developed financial liabilities no matter how much he spends, providing that the money came from the right places and in small enough amounts.[64] A ceiling will neither ensure that the source is beyond reproach, nor that the amounts given are small.

b. *Inequality of Financial Resources and Unbalanced Presentation*

A second interest of reform legislation is the elimination of inequalities of opportunity to communicate with the voters in order to assure a balanced presentation of all sides of every issue, and to prevent a candidate with greater resources from drowning out the voice of his opponent with massive media, mailings, or organization.

It becomes apparent that ceilings on expenditures fail to achieve the desired result. Those who have the greatest difficulty in projecting their views and qualifications before the voters, and who are supposedly the ones who would benefit the most from a limitation on spending, are third party candidates and those with meager financial resources, poor name recognition, or poor issue identification. Professor Martin Redish discusses the plight of the resourceless candidates who cannot afford to put their views across to the electorate:

> [S]pending limitations . . . fail to aid poorer third parties or financially lacking candidates in a manner which advances the fundamental goals of the first amendment. For such limitations in no way help these individuals familiarize the public with their names and policies. At most, all the spending ceilings can hope to do is to keep the voters as unfamiliar with the candidates who have access to large financial support as they are with the less wealthy. In the words of one commentator, "the most important effect of money in a political campaign is not that the candidate with the most money will win, but that the candidate with the lesser amount of money will not be able to present his case to undecided voters."[65]

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supra note 6, at 109-26 (testimony of Senator G. McGovern).

[64] *1973 Hearings*, *supra* note 6, at 61.

[65] Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900, 919 (1971) (footnotes omitted).

It is immediately obvious that a ceiling will not provide the poorer candidate with postage for district-wide mailings or cheaper rates for television spots. Instead, the only effect will be to curtail the amount of information voters will be able to receive from the more wealthy candidates. From this perspective, a ceiling acts more as a penalty on wealth than as an aid to those most in need; money is effectively taken from the purse of the rich, but is not in any way distributed to the poor. The uninformed become less informed.

To meet the goal of an educated electorate one needs to develop the concept of a floor, not a ceiling.[66] Reform legislation should provide a certain minimum resource level for bonafide candidates so as to guarantee that even the less wealthy or less well known candidates can achieve a minimum of name recognition and publicity. Such a proposal will be examined below.[67]

The use of a ceiling as a device to prevent one candidate from drowning out his opponent has found adherents in the halls of Congress, where incumbents have expressed alarm at the possibility that a wealthy candidate may enter a race, pour thousands of dollars into a media campaign, and thereby effectively neutralize the advantage of name recognition which an incumbent enjoys.[68] An argument can be made that extravagant media campaigns can drown out opponents. It may also be contended that such campaigns cheapen the electoral selection process by promoting images and impressions rather than issues and programs, thereby lessening the educational role of a campaign. There are grave questions, however, as to a ceiling on expenditures as a means to rectify these evils.

In drafting the first amendment, our Founding Fathers must have placed a great deal of faith in the people to sift through all the campaign rhetoric that might pass their way. The dreaded effects of a media campaign on a voter should be considered in light of a basic faith in the American electorate.

> This concern over information which "insults" the voter or "overwhelms" him represents a basic lack of faith in the ability of the individual to sort out the logical from the illogical, the important

[66] On the subject of floors, *see* Fleishman at 479; *1973 Hearings*, *supra* note 6, at 224.

[67] *See* notes 116-20 *infra*, and accompanying text.

[68] *See generally 1973 Hearings*, *supra* note 6, at 95-98 (testimony of Representative Murphy).

> from the frivolous. Whether such a lack of faith is justified is open to question. But the fact remains that the first amendment, and indeed the whole concept of self-government, are premised on the concept that the individual does have this ability (whether he chooses to use it or not), and until that concept is rejected, any governmental efforts to protect the public from confusing or irrational information in the political sphere must be considered inconsistent with the policy of the first amendment. The theory of the "marketplace of ideas" is that irrational information will merely spotlight by contrast the rational or correct course.[69]

If a media campaign is to be rejected, it should be rejected by the people who are subjected to it, not by a legislative act which infringes on first amendment rights. Evidence does support the theory that voters will reject a campaign which they consider to contain excessive media.

A 1974 post-election survey in the Tenth Congressional District of Illinois revealed one voter who did indeed "reject" what she thought to be excessive advertising.[70] The Mikva campaign, as its only attempt at broadcast media advertising during the 1974 elections, developed a radio spot in which the interest group ratings of the two candidates were compared. The same advertisement was run several times a day for several weeks. In the post-election survey, the respondent, a Democrat, gave this as her reason for voting as she did:

> Well, I think Mikva (the Democrat) is the most qualified. I have always liked him and voted for him in 1972. But it's funny, I got so sick of hearing that damn commercial about the ratings that I voted for Young. You probably think that's stupid, don't you?[71]

While it is apparent that this woman rejected what she considered to be excessive advertising, consideration should also be given to the voter who seldom listened to the two stations on which the advertisement was broadcast, and heard it for the first time only days before the election. It is true that if someone hears a commerical 30 times and receives the entire message the first 3 times they hear it, the last 27 times may be wasted.[72] This is not true, however, for those individuals who hear it for the first time

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[69] Redish, *supra* note 65, at 911 (footnotes omitted).

[70] This survey, in which the author took part, was designed to give the Mikva campaign some indication of the effectiveness of various campaign activities.

[71] Telephone interview in Evanston, Ill., Nov. 12, 1974. The respondents were asked to name two or three reasons why they voted as they did.

[72] Redish, *supra* note 65, at 913.

on the 16th, 25th, or 30th time it is broadcast. There were surely a good many individuals in the Tenth District who never once heard that "damn commercial about the ratings," as well as many who heard it once or twice, but not enough to recall the content. A spending ceiling may prevent more individuals from hearing such campaign advertisements. Therefore, not merely the right of a candidate to broadcast his views, but also the first amendment right of the voters to hear these broadcasts is at stake.

Finally, an attempt to equalize opportunity to be heard in the campaign forum falsely assumes "that someone—presumably Congress—knows how much information is the right amount . . . ."[73] There is, however, inherent in any attempt by the Congress to establish a ceiling the following "Catch-22."

There are two competing factors which must be taken into account in setting the ceiling, and in the final analysis, they are mutually exclusive. First, unless the ceiling is set fairly high, few challengers will be able to mount a successful campaign against an incumbent. The advantages of incumbency, in terms of name recognition, constituent service, and the advantages that inhere in most all elective offices, are formidable obstacles to overcome.[74] Second, to be balanced against this need for a high ceiling is the need for a ceiling low enough to ensure that a candidate of limited means will not be outspent by too great a margin. If the ceiling adopted by Congress in the Campaign Act of 1974 is supposed to meet this goal, it has missed its mark, for the ceiling established is far too high to aid most of the resourceless candidates. The average amounts raised by incumbents and challengers in House contests in 1972 were $58,359 and $31,355 respectively.[75] The average raised by incumbents actually falls short by $25,641 of what candidates may now spend in the primary alone. An additional $84,000 may then be spent in the general election. To the average challenger who was able to scrape up only $31,355 in 1972, it will be small comfort to realize that the incumbent is limited to a mere $168,000 in his combined 1976 primary and general election campaign.

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[73] Fleishman at 455.

[74] *See* text accompanying notes 160-75, *infra*.

[75] Rohde, *Public Financing of Federal Election Campaigns*, 6 COLUM. HUMAN RIGHTS L. REV. 43 (1974).

The ceiling that has been set for the House races—$84,000 each for the primary and the general campaigns—is clearly too high to aid a candidate with limited resources. This ceiling may also be too low to enable an effective challenge against an incumbent.[76] This leads to the conclusion that:

> [I]f one really believes the people are so easily fooled and so in need of protection, there is no end to the campaign tactics eligible for regulation and no end to the need to increase the power of those *not* fooling the public. Indeed, the most disquieting aspect of the drive to regulate campaign money is that so many of its adherents view themselves as possessing a monopoly of political truth.[77]

c. *Deterrence of Potential Candidates*

Finally, there is the question of deterrence: Will able candidates be deterred from running for office by large campaign costs? The most important aspect in an analysis of this question relates to the availability of funds, and to the factors which determine to whom campaign donations go. The traditional argument is that money flows to incumbents,[78] not to challengers. If this is in fact true, then challengers may well be deterred from entering a race. In the 1972 House races, incumbents were able to outraise their challengers by a margin of almost two to one.[79] On the Senate side the inequality was even greater, incumbents raising $525,809 and challengers only $243,070.[80] Common Cause has gone so far as to declare that we have a party of neither Democrats nor Republicans, but "an Incumbency party which operates a monopoly."[81]

There is, however, an alternative theory to suggest to whom money flows and why. Professor Fleishman suggests that the amount of money raised is an indication of a candidate's support, rather than the means of his obtaining support.[82] The hypothesis is that the more likely to win a candidate appears, the more support he will have and the more money he will attract, whether an incumbent or a challenger. The reverse would also be true: The

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[76] *See* text accompanying notes 147-50, 157-59, *infra*.

[77] R. WINTER, *supra* note 23, at 12.

[78] This is the conclusion reached by Common Cause after an extensive analysis of 1972 campaign spending. 31 CONG. Q. WEEKLY REP. 3130 (1973).

[79] Rohde, *supra* note 75.

[80] *Id.* at 44.

[81] Common Cause, *supra* note 7, "Common Cause Releases Study of 1972 Congressional Campaign Finances."

[82] Fleishman at 459.

less likely to win one appears the less support he will receive. Senator Baker addressed himself to the relationship between raising money and getting votes:

> It seems to me that during this hearing, we need to keep clearly in mind the fact that in the American elective process, the campaign, the effort to have a broad base of voter support is only narrowly more intensive than the campaign to have a broad base of financial support which I think subsequently negates the idea that the public should be or is cynical about the large sums of money that are spent.[83]

There is some statistical support for the hypothesis that the likelihood of winning attracts money. Thirteen of the 40 challengers for House seats who were successful in 1974 also ran in 1972. The average amount spent by those 13 candidates in their first bid for election was $59,218, while the expenditures by the same challengers averaged $112,483 in 1974.[84] This dramatic 90 percent increase could be the result of the increased perception on the part of the voters supporting the challengers (or opposing their opponents) that the possibility of a victory was better in 1974 than in 1972. The candidate, once perceived as a likely winner, would attract greater resources and thus be able to spend more money. Statistics on the 1972 House races released by Common Cause are also consistent with the theory that it is the "winnability factor"[85] which determines the flow of money. These statistics show that the closer the race, the higher and more equal are the expenditures.[86]

Winning percentage (Range)	Number of Candidates	Winner's expenditures (Average)	Loser's expenditures (Average)
70% to 90%	97	$ 38,729	$ 7,479 [19.3%]
65% to 70%	66	42,212	16,060 [38%]
60% to 65%	91	55,065	30,483 [55.3%]
55% to 60%	60	73,616	54,600 [74.2%]
up to 55%	66	107,378	101,166 [94.2%]

As the bracketed numbers clearly indicate, as the victory margin

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[83] *1973 Hearings*, *supra* note 6, at 58.

[84] All 1974 figures are computed on the basis of figures found in Common Cause Press Release, April 11, 1975, on file with the *Denver Law Journal*. The 1972 figures are computed from statistics provided by Common Cause. 31 CONG. Q. WEEKLY REP. 3131-37 (1973).

[85] *See* H. ALEXANDER, *supra* note 5, at 3.

[86] Common Cause, *supra* note 7, House Appendix A.

narrows, the ratio of the loser's expenditures to the winner's rises remarkably.

There is, however, one other important statistic to which Common Cause did not address itself. In the 66 races in which the winner received less than 55 percent of the vote, 40 involved incumbents. In those 40 races, challengers actually outraised incumbents $106,865 to $95,849.[87] This refutes the idea that money flows to incumbents only. It may suggest that in a closely contested race, one which will be decided by less than 10 percent of the vote, incumbents may have little or no advantage in raising funds. The chance of winning in these contests is equally split; both candidates are seen as possible winners.

Although there is currently a lack of research on the effects of money in political campaigns[88] and definite conclusions are impossible to draw, there certainly is some basis for the hypothesis that winnability determines the flow of money. Average incumbents outraise their challengers by a margin of two to one. In closely contested races the ratio approaches one to one until in the very closest races, challengers outraise their incumbent opponents. The conclusion may be drawn that it is the winnability factor which most likely enhances the ability to raise funds and thereby dictates an inequality of opportunity to communicate a candidate's views. A candidate's resources may be insufficient because people generally prefer to contribute to those who will win, and "there is nothing either illegal or improper in the simple fact that they prefer to support likely winners rather than losers."[89]

To achieve the goal of equalizing opportunities to communicate by equalizing availability of funds, a ceiling must be such as will increase a candidate's winnability factor, for unless one's chances of winning appear good a candidate will be unable to raise sufficient funds. But, again, the "Catch-22" applies. A ceiling which is set low, while possibly equalizing expenditure levels by limiting the amount an incumbent may spend, would not permit challengers to spend sufficient amounts to overcome the

[87] This is computed on the basis of figures provided by Common Cause. *See* note 84 *supra*. In 1974 there were 81 races in which the winner recieved less than 55 percent of the vote. The incumbents in these 81 races outraised their challengers by an average of $90,113 to $79,243, yet 37 of the 81 incumbents were outspent. *Id.*

[88] *See 1973 Hearings*, *supra* note 6, at 220 (statement by H.E. Alexander).

[89] Fleishman at 462.

advantages of incumbency. A ceiling that is set high, while allowing challengers to spend enough money, would do nothing to increase a challenger's winnability factor, that is to convince the voters that the chances of a challenger's victory are good. A ceiling established at some level in between may effectively remove the advantages of a low and a high ceiling, leaving only the disadvantages of both.

While the necessity of fund raising certainly serves as a deterrent to some prospective candidates, this deterrence may produce some beneficial results. The oft-quoted log-cabin dream in our country—that anyone can grow up to be President—may be true, but it does not mean that everyone deserves to be President, a Representative, or a Senator or that the road to public office is an easy one. A campaign must necessarily serve as a screening process,[90] a proving ground where those with insufficient qualifications, or perhaps without sufficient roots in the community or respect from their peers, will be weeded out.

In summary, a ceiling on expenditures will do nothing to ensure that a candidate of limited wealth or resources can achieve even minimum recognition or exposure. Rather, a ceiling serves only to curtail the outflow to the voters of information about the candidate who has money or the support to raise it. Additionally, the deterrent effect of current campaign spending levels may not be as great a factor as a first glance suggests. If it is winnability that determines where money goes, a candidate for the House or Senate, if of high caliber and possessing a good base of community support, should then be a financially attractive candidate to those sharing his political philosophy. On the other hand, if one is up against a candidate with high name recognition or popular appeal, or against one entrenched in office, then it is a low winnability factor, not the cost of campaigning, which would deter one from running. Under such circumstances, spending ceilings are not likely to motivate anyone to run who is not already so inclined. It would be difficult if not impossible to defeat such an incumbent with equal spending limits. Finally, it is very difficult to develop a spending ceiling that will be low enough to ensure one with little financial support a minimum of recognition and at the same time high enough to enable challengers to mount an effective campaign against incumbents.

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[90] *See* R. WINTER, *supra* note 23, at 5.

2. Governmental Interest Unrelated to Suppression of Speech

The third element of the Court's test as set forth by Warren in *O'Brien* is that the governmental interest promoted by legislation must be unrelated to the suppression of free speech. Deliberations on the Campaign Act of 1974[91] reveal a legitimate concern on the part of Senators and Representatives that the spiraling costs of political campaigns may endanger the purity of the electoral process. On the other hand, there is also evident a strong awareness of the possibility that spending limits will serve to protect the interests of incumbents in power.[92] The incredible lack of concern for the rights of free speech among a body of lawmakers, many of whom are lawyers, leads one to suspect that the effect of reducing speech may have been more than an incidental by-product of a desire to preserve the purity of the electoral process. Senator Buckley, referring to the actions of his colleagues, pointed out that:

> The fear of overly persuasive campaigns, particularly when expressed by incumbent members of Congress, strikes dangerously close to prohibited suppression of speech because of its content. It must certainly give the Supreme Court pause when they see officeholders with vested interests in remaining officeholders passing legislation that restricts the ability of potential opponents and average citizens alike to alter the political makeup of the Congress.[93]

In light of the above, the motive of Congress in passing this legislation deserves particular attention.

The Court has taken the approach that it will seldom view its judicial function as appropriate to an investigation of what was on the minds of lawmakers while framing legislation.[94] In deferring to the judgment of Congress, the Court has emphasized that where Congress brings a "specially informed legislative competence" to its decisionmaking, then it is "Congress' prerogative to weigh these competing considerations."[95] Legislative competence should be well developed in the field of campaigns. The

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[91] *See generally* note 16 *supra*.

[92] *See* text accompanying notes 102 and 105, *infra*. *See also* Part II *infra*.

[93] 120 CONG. REC. S. 18,537 (daily ed. Oct. 8, 1974) (remarks of Senator Buckley).

[94] *See* Barenblatt v. United States, 360 U.S. 109 (1959); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Burroughs v. United States, 290 U.S. 534 (1934).

[95] Katzenbach v. Morgan, 384 U.S. 641, 655-56 (1966) (relating to literacy requirements for voting) (footnote omitted).

Court's view is that the people's recourse to bad law and the products of ill-conceived motive lies with the ballot box, not with judicial determinations: "The forum for correction of ill-considered legislation is a responsive legislature."[96]

However, while stating that inquiries into congressional motives and purposes are hazardous,[97] the Court does on occasion entertain an evaluation of congressional purpose behind legislation.[98] One instance in which a legislative purpose and motive may receive at least a modicum of scrutiny is suggested by *Kramer v. Union Free School District No. 15*.[99] There the Court said:

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are so structured as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[100]

This analysis suggests that the basis of the Court's lack of inquiry into congressional motive is the assumption that the voters will serve to check the actions of a responsive legislature should bad laws be passed or congressional motives be suspect. If a spending ceiling will reduce the responsiveness of the legislature, the rationale for not scrutinizing congressional motive—the responsiveness of the legislature—is no longer applicable. The crucial question is whether spending ceilings do affect the responsiveness of the Congress. Ceilings may well serve to perpetuate incumbents in office by not allowing challengers to spend sufficient funds to attain a possible victory.[101] If this were in fact the result of ceilings, then the responsiveness of the Congress would be greatly impaired and therefore congressional motive should be considered by the Court.

Congress was well aware of the potential effects spending ceilings would have on future campaigns. Representative Armstrong put it very clearly before the House:

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[96] Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949).

[97] United States v. O'Brien, 391 U.S. 367, 383 (1968).

[98] *Id.* at 385-86.

[99] 395 U.S. 621 (1969).

[100] *Id.* at 628.

[101] *See* text accompanying notes 147-50, 157-59 *infra*.

> Finally, we all know—and I think most of us know in our hearts—this is a sweetheart incumbent bill. This is a bill which is going to make it harder than ever to defeat an incumbent of either party. It sets the kind of limits that makes it almost impossible for an unknown to become known, and thereby heightens existing advantages which incumbents enjoy.
>
> In view of the overall poor record of the Congress of the United States, it seems to me the last thing we need to do is to give further advantages to the incumbent Members of Congress. Let us defeat this bill and get on to some true reform which is so badly needed.[102]

Representative Armstrong's comments were followed by those of Representative Treen, who again asked whether challengers, under the limits set by the bill, could effectively challenge incumbents.[103] These legitimate constitutional questions raised in the bill were then summarily dismissed by Representative Wayne Hayes, who characterized the preceding speech as "90 percent baloney."[104]

Senator Buckley vigorously opposed the spending limits as set, denouncing them as being highly protective of incumbents:

> It is my firm belief that a certain amount of money must be spent by a challenger just to offset the incumbent's advantage . . . .
>
> If this assumption is correct, the uniform spending limits . . . can only aid incumbents because they make it impossible for a challenger to spend the money necessary to overcome the incumbent's advantage. It is this feature . . . that makes it both fair and accurate to characterize the bill as the Incumbent Protection Act of 1974.[105]

Considering these statements and Congress' relative lack of concern regarding the constitutional questions inherent in any spending ceiling, the Court, fearing that the responsiveness of the Congress may in some degree be reduced, should take a close look at congressional motive to see whether, as Senator Buckley phrased it, the Congress has come "dangerously close to prohibited suppression of speech because of its content."[106]

3. Restrictions on Speech Merely Incidental and Necessary to Promote the Governmental Interest

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[102] 120 CONG. REC. H.R. 7900 (daily ed. Aug. 8, 1974).

[103] *Id.*

[104] *Id.* at H.R. 7901. One cannot tell to whom Representative Hayes was referring (Armstrong or Treen or both), or which part of the speech was the 10 percent not constituting "baloney."

[105] *Id.* at S. 4938 (daily ed. April 1, 1974).

[106] *Supra* note 93.

The final element of Chief Justice Warren's test in *O'Brien* is that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" to be protected.[107]

While it has been suggested throughout this note that there are open to Congress more effective alternatives to accomplish the goals sought to be achieved by spending ceilings, there is no actual requirement by the Court that less drastic alternatives to achieve certain goals be available before an unconstitutional infringement on free speech will be struck down.[108] However, if there are less drastic means of achieving these goals, then it is less likely that these ceilings will be allowed to stand. The Court has said:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[109]

There are less drastic means to achieve political equality on the campaign trail. To combat the ability of the large donors to gain influence with federal officials there are several approaches available. First, there is the alternative of a ceiling on the amounts an individual may contribute to any one campaign. This is the approach taken by Congress in the Campaign Act of 1974. The amount which an individual may contribute to any one federal candidate is now limited to $1,000 per election[110] and "[n]o individual shall make contributions aggregating more than $25,000 in any calendar year."[111] Although beyond the scope of this note, there are many of the same constitutional problems

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[107] 391 U.S. at 377.

[108] United States v. Robel, 389 U.S. 258, 267 (1967):
> It is not our function to examine the validity of that congressional judgment. Neither is it our function to determine whether [a particular program] exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress.

[109] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[110] *See* note 60 *supra*.

[111] 18 U.S.C.A. § 608(b)(3).

inherent in limitations on contributions as there are in expenditure ceilings. The effects, though, are surely not as great.[112]

Another less drastic means to achieve this goal would be to impose a heavy tax on any contributions over a certain limit. The revenues could be placed in the Presidential Election Campaign Fund[113] or earmarked to defray the costs of the Federal Election Commission, established to administer the Campaign Act of 1974.[114] In addition, the size of the present tax credit/deduction could be increased so as to encourage a greater number of small donors.[115]

To help ensure at least a modicum of equality in campaign opportunities, the concept of a floor rather than a ceiling should be carefully investigated:

> To counteract the advantages of incumbency or of wealth, we need not enact questionable ceilings, but rather look toward establishing floors. By floors are meant minimal levels of access to the electorate for all legally qualified candidates.[116]

The most attractive feature of floors is that they entail no restrictions on first amendment rights.[117]

To promote the concept of a floor at least one campaign reformer has advocated free mailing privileges or public subsidies to ensure minimal exposure to challengers.[118] The bill, which was passed by the Senate and sent into conference, did in fact contain a public financing provision for House and Senate races, as well as for presidential contests.[119] The use of the frank (free mailing privileges) by candidates is hardly a novel concept, yet the reluctance of incumbents to share their free mailing privileges with

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[112] For a general discussion of the constitutional issues involved in limitations on contributions, see A. ROSENTHAL, *supra* note 54, at 12-29.

[113] *See* INT. REV. CODE OF 1954, § 9006(a). This fund is to be used to finance presidential campaigns, starting with the 1976 elections. *Id.* §§ 9001-06.

[114] 2 U.S.C.A. § 437c (Supp. I, 1975).

[115] One may currently elect either a tax deduction or a tax credit. A tax deduction of $50, or $100 for those filing a joint return, is allowed. INT. REV. CODE OF 1954, § 218. Or one may take a tax credit of one-half of all political contributions, with a maximum credit of $12.50, or $25.00 for those filing a joint return. *Id.* § 41.

[116] *1973 Hearings*, *supra* note 6, at 224 (statement by H. E. Alexander).

[117] Fleishman at 479.

[118] *1973 Hearings*, *supra* note 6, at 224 (statement by H. E. Alexander).

[119] *See* S. 3044, 93d Cong., 2d Sess. § 502(c)(1)(A) & (B)(1974). These public financing provisions for House and Senate campaigns were removed from the Senate bill in Conference Committee.

challengers, plus the high cost of such a proposal[120] appear to have blocked any attempt to get this idea through Congress.

Although requiring a far greater financial commitment by the federal government, these alternatives would accomplish the same goals as those sought to be achieved by expenditure ceilings. They would result in less, if any, infringement on first amendment rights. It would appear that because there are alternatives available to Congress, a ceiling on expenditures would not meet the fourth criterion of the Court's test in *O'Brien*.

This evaluation of the component elements of the Court's test of the constitutionality of restrictions on free speech, as applied to the spending ceilings on political campaigns, leaves grave questions as to whether a limitation on expenditures will pass the test of constitutionality when brought before a court of law. Limitations appear not only to fall far short of achieving the goals they were designed to promote, but also to infringe protected freedoms far more heavily than would alternatives available to the Congress.

D. *Prior Restraint*

In none of the many cases sustaining the right of Congress to regulate federal elections has a congressional attempt to limit the amount or content of political speech been sustained.[121] It is hard to see why the Court would start a new precedent in a case involving the constitutionality of the Campaign Act of 1974. It has been suggested that spending ceilings would infringe primarily the amount rather than the content of speech and that the balancing test would be appropriate to weigh the constitutionality of the law.[122] In *Konigsberg v. State Bar*[123] Justice Harlan discussed governmental attempts to limit the unfettered exercise as opposed to the content of speech:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequis-

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[120] *See* 120 CONG. REC. S. 5080 (daily ed. April 2, 1974).

[121] Fleishman at 449-50 and cases cited therein.

[122] Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 214, 224 (1972).

[123] 366 U.S. 36 (1961).

> ite to constitutionality which has necessarily involved a weighing of the governmental interest involved.[124]

It is possible that a spending ceiling on campaign expenditures has the effect of limiting the content, not just the exercise, of speech. If this is true, then the balancing test may not be the appropriate test of constitutionality. Limiting the content of speech may constitute a prior restraint on freedom of expression.

Arguably, a candidate who is prohibited in advance by a ceiling on expenditures from spending more than a specified amount of money is a victim of prior restraints on his freedom of expression. This is particularly true in that certain types of campaign activities, such as the distribution of literature, are recognized by the Court as vital elements of the right to free speech.[125] It may be true that a ceiling on spending would *primarily* limit the amount as opposed to the content of speech. However, the small percentage of the time that a ceiling would limit the content of speech raises the most serious constitutional questions and poses a grave threat to our electoral process.

An election is by definition limited in time—it ends on election day. No speech, charge, countercharge, or response can have any effect on a voter once the "X" is made or the lever pulled. Anything worth saying by a candidate must be expressed prior to the time the people vote. A spending ceiling could substantially alter the nature of this process of campaign interaction. A candidate who had spent his limit could not turn to television or radio to answer a last minute charge by his opponent, nor could he buy time to air his response to, or opinion of, an event of major significance occurring just prior to election day. The speech that would be barred is no ordinary speech, "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[126]

In *Mills v. Alabama*[127] the Supreme Court invalidated a state statute the effect of which was similar to that which may result from a ceiling on expenditures. Alabama had passed a law which barred electioneering on election day. One of the daily newspapers ran an endorsement of a candidate in its election day issue

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[124] *Id.* at 50-51.

[125] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[126] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[127] 384 U.S. 214 (1966).

and was prosecuted for violation of the statute. The Court, after discussing the importance of free speech in the political arena, went on to say:

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law . . . then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered.[128]

It seems unlikely the Court would strike the Alabama statute, yet let a spending ceiling stand when the very same evil condemned in *Mills* may be generated by limitations on expenditures.

To punish a candidate for poor budgeting by cutting off his means to communicate with the voters is a severe penalty. Such a penalty punishes not only the candidate but, more importantly, the public at large. Under the first amendment, the voters have a very precious and essential right to hear a candidate's response to a charge, or his reaction to an event.[129] This right is not based on whether the candidate has spent his limit. The Court has stated that:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . . Without those peripheral rights the specific rights would be less secure.[130]

One cannot, under the burden of a ceiling, punish the overspender without punishing the public also.

The effect of a ceiling may also be to induce a candidate to develop a strategy whereby he attempts to deplete the resources of his opposition in order to push him toward the limit. It is far more difficult to undo damage of a timely, unfounded charge than to make the charge in the first place. A candidate's inability to meet a charge from his opponent is hardly desirable.

In two recent cases courts have been unwilling to uphold a prior restraint on speech. In its decision involving a suit by the government to enjoin publication of the "Pentagon Papers,"[131] the Supreme Court faced the issue of prior restraint. The justification

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[128] *Id.* at 220.

[129] *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[130] Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

[131] New York Times Co. v. United States, 403 U.S. 713 (1971).

for the desired restraint on publication was the national security of the country, which the government feared would be compromised if the "papers" were published.[132] In ruling against the United States, the Court held that the government had not met the requisite burden of justification for the restraint.[133] The rule had been stated in an earlier case that, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[134]

A recent California case[135] involved an injunction against further publication by a candidate for public office of allegedly libelous newspaper excerpts, or of any versions of the excerpts, about his opponent. Recognizing that prior restraints are only permissible under extraordinary circumstances, such as to prevent disclosure of military secrets in time of war or "to prevent the utterance of words that may have the effect of force,"[136] the California Supreme Court ruled that the prior restraint imposed on the plaintiff candidate could not be upheld, even though the issue involved a restraint of libelous material.[137]

Once a prior restraint is established, the party defending the restraint has the burden of overcoming the "heavy presumption against its constitutional validity."[138] The fact that a ceiling on expenditures may act as a prior restraint on speech is one of the most forceful arguments against the constitutionality of ceilings as a method of campaign reform. There is little to suggest that a ceiling on campaign expenditures, which can act as a prior restraint, can withstand the heavy presumption against its validity.

II. Spending Limits and Equal Protection

A. *The Advantages of Incumbency*

One effect of spending limitations is that challengers may no longer be able to spend more money in a congressional race than their incumbent opponents. It is the contention of this note that

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[132] *Id.* at 718 (Black, J., concurring).

[133] *Id.* at 714.

[134] Bantam Books, Inc. v. Sullivan, 37 U.S. 58, 70 (1963). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). One advocating prior restraints "carries a heavy burden of showing justification for the imposition of such a restraint." *Id.* at 419.

[135] Wilson v. Los Angeles County Superior Court, 43 U.S.L.W. 2379 (Cal. March 4, 1975).

[136] *Id.*

[137] *Id.*

[138] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

equal spending limitations for incumbents and challengers may in effect deny the latter the equal protection of the laws inherent in the due process clause of the fifth amendment.[139] This aspect of the new law presents another serious danger to our political system. Unfortunately, because full disclosure of campaign contributions did not go into effect until April of 1972,[140] no comprehensive conclusions can be drawn in regard to the amount of spending necessary to defeat incumbents. However, preliminary conclusions, based on the 1972 and 1974 congressional races, reveal some ominous statistics for challengers hoping to unseat current officeholders and lend support to the argument that a spending ceiling may have grossly unequal effects on incumbents and challengers.

During the last half century, incumbent Senators and Representatives have been successful in more than 80 and 90 percent of their campaigns respectively.[141] Between 1956 and 1972, House incumbents won 3,350 of 3,551 races, for a winning percentage of 94.34. Senate incumbents fared slightly worse, winning 222 of 261 or 84.67 percent.[142] The 1972 House elections marked the third straight election in which over 95 percent of incumbents were victorious,[143] while in the 1972 Senate races only 6 incumbents met defeat. The primary and general elections of 1974, a "disaster year" for incumbents, saw over 87 percent of House incumbents re-elected, while 85 percent of the incumbent Senators were successful.[144] Figures such as these led one commentator to write, "There is a tendency to believe that, aside from isolated instances where an over-riding issue is present, there is little excuse for defeat."[145]

Based on the impressive percentage of incumbents' victories,

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[139] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[140] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 406, 86 Stat. 20. This Act became effective 60 days after its passage on February 7, 1972.

[141] 120 CONG. REC. S. 4938 (daily ed. April 1, 1974) (remarks of Senator Buckley).

[142] *Hearings on H.R. 7612* at 2 (Supp.) (statement by Representative Cleveland).

[143] 31 CONG. Q. WEEKLY REP. 3130 (1973).

[144] For the 1974 congressional election results see 32 CONG. Q. WEEKLY REP. (Nov. 9, 1974). In 1974, 48 incumbents were defeated in races for the House; 8 in the primaries, 40 in the general election. Forty-four incumbents elected not to run. On the Senate side, four incumbents were defeated, two in the primaries and two in the general election. Seven incumbents chose not to run for re-election. *Id.*

[145] 120 CONG. REC. S. 4938 (daily ed. April 1, 1974) (quote by Charles Clapp in remarks of Senator Buckley).

one would suspect that the American people view the current legislature and its performance with high regard. But Senator Buckley points out that the reverse is true:

> Recent poll figures force one to the conclusion that the Congress is not exactly held in the highest esteem by the American people. In fact, as most of us are aware a number of pundits have observed that we are presently less popular even than the President [Nixon] with a collective approval rating of but 21 percent.[146]

According to Common Cause, great sums of money are required to defeat such disapproved legislators.[147] In the November 1972 races for the House, only 10 incumbents were defeated, and 8 of the 10 were outspent by their challengers.[148] It took an average of $125,521[149] to defeat these incumbents. On the Senate side, only six incumbents were defeated, and four of the six were outspent.[150]

The 1974 House elections proved to be an anomaly in the recent trend. Although over 95 percent of all incumbent Representatives to run for re-election were successful in each of the three preceeding elections,[151] the percentage dropped below 90 percent in 1974.[152] The number of incumbents losing their seats in 1974 nearly quadrupled in respect to the number who lost in each of the three preceeding elections. This startling increase in the number of unsuccessful incumbents is in large part a result of the Watergate scandal and the effect the revelations of political corruption had on the minds of the voters.[153]

As a result of Watergate, 1974 was a relatively easy year for challengers, particularly Democratic ones. This being the case, one can hypothesize that although challengers have to spend large amounts of money and in many cases outspend their oppo-

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[146] *Id.* (remarks of Senator Buckley).

[147] Common Cause, *supra* note 7, "Common Cause Releases Study of 1972 Congressional Campaign Finances."

[148] *See* 31 CONG. Q. WEEKLY REP. 3130-37 (1973).

[149] Common Cause, *supra* note 7, House Appendix B. It is not possible, on the basis of the 1972 or 1974 spending figures, to apportion a certain percentage of total expenditures by a candidate to the general election and a certain percentage to the primary. Reporting was not required for each election separately.

[150] 31 CONG. Q. WEEKLY REP., *supra* note 148.

[151] *See* note 143 *supra*.

[152] *See* note 144 *supra* and accompanying text.

[153] To attribute this "high" turnover to the state of the economy ignores the fact that of the 40 incumbents to lose, 36 were Republicans and only 4 were Democrats. 32 CONG. Q. WEEKLY REP. 3066 (1974).

nents to be successful, the spending in 1974 need not have been as high as in 1972 because incumbency in certain districts in 1974 was more a disadvantage than an advantage.[154] It would also follow that knowing the disadvantage they faced, incumbents would be less likely to allow themselves to be outspent. This apparently was the case.[155] Spending figures for the 1974 campaigns support the above hypothesis, that given the over-riding issue of Watergate, challengers needed less money to be successful. Based on an evaluation of the 1974 spending reports filed by the candidates and committees, an average of $100,468 was spent by the challengers who were successful in the 1974 general election, as compared to $125,521 in 1972.[156] Additionally, of the 40 incumbents defeated in the November 1974 elections, 22, or 55 percent, were outspent as compared to 80 percent in 1972.[157]

While neither the average amount spent by successful challengers, nor the percentage of challengers outspending their opponents, was as high in 1974 as in 1972, even considering the impact of the Watergate affair the 1974 figures are consistent with the theory that the average challenger must be prepared to spend a large amount of money, as well as to outspend his opponent, if the chances of victory are to be good. When only 12 to 13 percent of the incumbents to run for re-election are defeated[158] and over one-half of that 12 percent are outspent,[159] the ability to outspend must be regarded as an important factor.

On the basis of the successful record established by incumbents over the last half century, and of the expenditure statistics for congressional races in the 1972 and 1974 elections, a strong argument can be advanced that equal expenditure limitations are inherently unequal in their impact on incumbents and challengers.

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[154] Four of the 36 Republicans who lost were members of the House Judiciary Committee and had consistently supported the President during the television impeachment hearings. They were: David Dennis, Joseph Maraziti, Wiley Mayne, and Charles Sandman. *Id.* *But see id.* at 3066, stating that three, Dennis, Mayne, and Sandman, faced problems before the impeachment inquiry began.

[155] In 1972 the 40 incumbents who lost in 1974 spent on the average $69,199. Faced with serious opposition in 1974, their average expenditures rose to $101,173. *See* note 84 *supra*.

[156] *Id.*

[157] *Id.*

[158] *See* note 144 *supra* and accompanying text.

[159] *See* text accompanying note 157 *supra*.

If it is not, as polls suggest, a high regard by the American people that returns large percentages of incumbents to Washington each election, there must be other factors. Most of these can be found in the nature of elective offices. Senators and Representatives are elected to serve their constituencies and the American people. To fulfill this role, they must have at their disposal resources such as staff allowances, office expenses, access to media, and the frank. Staff allowances of $204,000 are allowed to congressional officeholders.[160] An incumbent thus has at his disposal expert advice and a continuous source of research into matters of public concern. The challenger must often start from scratch in research on issues and development of alternative policies, and this may require the hiring of staff assistants at his own expense. In addition, incumbents are entitled to have several district offices from which to provide constituent services. By far the majority of work conducted in a district office involves case work,[161] solving problems for constituents. Casework involves people, and people mean votes. Even a courteous reply to a letter written to a congressman can so impress the constituent that it ensures the incumbent a vote.[162]

Access to the media is also an important advantage inherent in incumbency.[163] While incumbents do not have the networks at their control, a well-seasoned politician can certainly manipulate press coverage by introduction or sponsorship of key legislation, delivery of major policy addresses or statements on critical events, or the announcement of a press conference. While the challenger may attempt all the above except the introduction and sponsorship of legislation, his words are not *official* words, and are not apt to be accorded the same weight given those of an incumbent.

Perhaps the greatest advantage enjoyed by incumbents is the

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[160] Interview with Genie Ermoyan, Administrative Assistant to Representative Abner Mikva, in Washington, D.C., Mar. 18, 1975.

[161] Estimates indicate that from 60 to 75 percent of the work in a district office involves casework. Telephone interviews with Jack Marco and Pearl Alperstein, District Managers for Representatives Abner Mikva and Tim Wirth, respectively, April 12, 1975.

[162] While canvassing a neighborhood in October 1974, the author talked to an elderly lady who had been so impressed by the official reply she had received from her congressman that she had framed it. Her vote had been sewn up by this letter.

[163] *See* 120 CONG. REC. H.R. 10,337 (daily ed. Oct. 10, 1974) (remarks of Representative Treen).

frank—the ability to send official mail postage free.[164] Free mailing is vital to the functioning of a congressional office, and if used with an eye toward re-election can be used to gather a very broad base of support by convincing voters that their representative is working hard and is doing as much for them as possible. The frank is used in essentially two ways: First, in the normal day to day correspondence of an office; and second, to send district-wide newsletters or questionnaires to the residents of a district. Members of the House enjoy one further advantage in their district-wide mailings—each letter need not be individually addressed, but may be sent under the label "Postal Patron, 'X' Congressional District."[165] The advantage this affords a mass mailer may only be properly appreciated by recognizing the many hours spent hand addressing or typing and sticking on labels. The cost savings of the "Postal Patron" privilege can be enormous.[166] In addition, if a candidate exceeds his allowance for printing costs in mailing franked mail, he may claim as a tax deduction the excess expenditure.[167] To duplicate the output of franked mail by an incumbent could cost a challenger over $200,000.[168]

Nothing that has been said regarding the postal advantages or office and staff expenses is in any way intended to suggest these perquisites of elective office are excessive or unnecessary. Rather, the availability and wide use of these privileges are essential to the proper functioning of an office. What needs to be recognized, however, particularly by those who establish the ceilings on campaign expenditures, is that these advantages do exist and that they must be taken into account when imposing restrictions on expenditures. This must be recognized for one important reason: In practice, there is a very thin line between what can be considered official business and that which borders on electioneering. Liberal use of the above privileges may increase substantially the inherent inequalities which exist between incumbents and challengers.

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[164] *See* 39 U.S.C. § 3210 (1970).

[165] 39 U.S.C.A. § 3210(d)(1)(A) (Supp. 1975).

[166] A cost of $29 per 1,000 letters was quoted by American Products, a Chicago firm, for the addressing and processing required for mass mailings. Thus, if a congressional district has 168,000 households, as in the Tenth District of Illinois, the cost would be $4,872 just for the addressing and processing. Citizens Committee for Abner J. Mikva Press Release, July 18, 1974, on file with the *Denver Law Journal*.

[167] Fleishman at 469.

[168] *See* note 166 *supra*.

The use of the frank is for all practical purposes limited only by the conscience and ethical standards of those in office,[169] a fact which may appear frightening in light of the events of recent years. It has been suggested that an excessive use of the frank will be singled out by the voters, and therefore one must not abuse the privilege for fear of retaliation at the polls.[170] Experience dictates that this is not always the case, perhaps because it can be very hard for a voter to perceive the widespread effects a monthly newsletter can have. In Colorado's Second Congressional District, Democratic challenger Tim Wirth tried to make an issue of his opponent's use of the frank, but without success.[171] In the Tenth Congressional District in Illinois, district-wide mailings were being sent out at a rate of almost one a month by the incumbent Representative, with three arriving at every home in the district within a 4-week period in the summer months preceding the election of 1974. Yet in a survey taken in that district, one of the most affluent and well educated in the country,[172] the people expressed almost no concern with this recurring use of the frank,[173] so the challenger dropped the issue. This indicates that if the frank is effectively used, it is almost without practical limitation.

Representative Bill Frenzel introduced into the *Congressional Record* some illuminating statistics regarding the frank.[174] According to these statistics, the timing of franked mail, as indicated by activity in the congressional folding room, is significant. The work piles up every September and October of even numbered years—the congressional election years. In September and October of 1968, 1970, and 1972, there was twice as much work in the folding room as in those same months in the years of 1967, 1969, and 1971. Further, in October of 1968, 1970, and 1972, the folding room averaged about 85 percent more work than it did in the average month of those years.[175] One reason for this increase is clear: As the congressional session comes to an end, the mem-

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[169] H. PENNIMAN & R. WINTER, *supra* note 19, at 17.

[170] *Id.*

[171] Interview with Representative Tim Wirth in Denver, Feb. 13, 1975.

[172] N.Y. Times, Nov. 3, 1974, § 6 (magazine), at 75.

[173] Respondents were asked to characterize as "fair" or "unfair" the following statement: "Sam Young has spent a lot of taxpayers' money sending out a newsletter each month." The result was: Fair, 20%; Unfair, 67%; and Not Sure, 13% (Poll conducted by Peter Hart Research Associates, for Abner J. Mikva, Aug. and Sept., 1974).

[174] 120 CONG. REC. H.R. 8424 (daily ed. Jan. 14, 1974).

[175] *Id.*

bers of Congress send their final reports back to their constituencies,[176] complete with pictures of themselves and expressions of appreciations for being allowed to serve them during the preceeding two years. This is not necessarily improper, but, again, it is something that should be taken into account in establishing the level of ceilings. It obviously was not in the 1974 Act.

It is not sufficient to discount these advantages of incumbency by saying, as one congressman has said, that, "People do not vote for incumbents unless they are doing a decent job."[177] It may be because many incumbents do only a "decent job" that the Congress receives such low ratings in the polls. Representative Treen has said:

> [I]f one is going to defeat an incumbent, he has got to expose the incumbent's record.
>
> That means that we have got to go to massive newspaper, radio and television coverage to talk about the record. He cannot do that on the spending limits we have in this bill.[178]

As indicated by a majority of the races where incumbents were defeated in 1972 and 1974, "exposing the record" usually requires outspending the officeholder.[179]

In an effort to neutralize the tremendous advantages of incumbency, Senator Buckley introduced during the debate on the proposed ceilings an amendment to provide a challenger with a spending ceiling of 130 percent of the amount which could be spent by the incumbents.[180] His amendment, tabled in April of 1974 when first introduced, was later reintroduced and defeated by a vote of 17 to 61 just prior to the passage of the bill by the Senate.[181]

Statistics show that a large percentage of incumbents who lose are outspent, an event which, as a result of the ceilings established in the Campaign Act of 1974, may never happen again; an

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[176] *Id.*

[177] *Id.* at H. 7848 (Aug. 7, 1974) (remarks of Representative Pike).

[178] *Id.* at H. 7900-01 (Aug. 8, 1974).

[179] *See* text accompanying notes 148, 150, & 157 *supra*.

[180] 120 CONG. REC. S. 4937 (daily ed. April 1, 1974).

> (c) No candidate who is not an incumbent may make expenditures in connection with his campaign for nomination for election, or for election, to any Federal office in excess of 130 percent of the amount of expenditures which an incumbent candidate may make . . . .

Id.

[181] *Id.* at S. 18,537 (Oct. 8, 1974).

incumbent willing and able to spend his limit cannot be outspent by a challenger seeking to overcome the advantages which inhere to incumbents. An officeholder in this situation has a large edge in his race for re-election. And contrary to the renowned hare, he is unlikely to take a nap off to the side of the trail.

B. *Equal Protection of the Laws and the Application of Spending Ceilings*

The U.S. Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."[182] Although this prohibition applies only to the states, it is well settled that the equal protection clause is applicable to the federal government through the due process clause of the fifth amendment, when "discrimination may be so unjustifiable as to be violative of due process."[183]

A maximum ceiling of $84,000 on the expenditures of each candidate for each election creates on its face no "suspect categories" or "invidious discrimination." No one candidate is put into a classification different than another, and each is allowed equal spending. This is not, however, enough to satisfy the requirements of due process. The Supreme Court, in its decision in *Yick Wo v. Hopkins*[184] looked beyond the mere "on its face" test of the fourteenth amendment and went into the effects of the law as it was applied. It is now settled that although no classifications exist on the face of a statute, unjustifiable discrimination resulting from the application of a law may be "as invidious a discrimination as if [the statute] had selected a particular race or nationality for oppressive treatment."[185] The heavy burden which equal spending ceilings impose on the campaign effort of almost any challenger could constitute such discrimination.

The discrimination promoted by spending ceilings would be even greater in the case of third-party candidates.[186] Generally a third party has no grass roots organization as do the Republicans or Democrats, organizations whose expenditures for general activ-

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[182] U.S. CONST. amend. XIV, § 1.

[183] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[184] 118 U.S. 356 (1886).

[185] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). *See also* McLaughlin v. Florida, 379 U.S. 184, 194 (1964); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

[186] *See* Redish, *supra* note 65, at 919.

ities, though clearly inhering to the benefit of a candidate of its own party, may not come within the purview of the ceiling.[187] The classic example of the advantages of party organization is the case of a Democratic candidate running for election in the City of Chicago. While such a candidate has the benefit of one of the most unbeatable precinct organizations in the country, he would have to report, for all the benefit he received from the grass roots Democratic organization, not a penny of expenditure. To suggest that equal limitations do not discriminate in such a situation is pure folly. And while the argument can be made that a ceiling does not prevent a third party from establishing an organization, this is often impractical in that an organization is more likely to form around a winner, rather than to develop to form a winner. The potential effect of inhibiting the growth of third parties has been condemned by the Court in *Williams v. Rhodes*.[188]

Another discriminatory effect of spending ceilings exists where an incumbent is challenged in the primary, particularly in one-party districts, where the primary is in effect the election. The number of such districts is not insignificant. In the 1974 general elections, 46 races—over 10 percent of all races for the House—were unopposed.[189] Unlike a challenger to an incumbent of the opposing party in a two-party district, a challenger in a one-party district does not have a primary and an additional primary allotment of $84,000 with which to build his name recognition, present his programs, and develop the grass roots organi-

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[187] This "loophole" exists because activities such as a voter registration drive, a canvass to determine party preference, and an election day "get out the vote" campaign (which is based on the results of the canvass—one only brings to the polls those who are sure to vote "properly") if conducted by a party organization inhere to the benefit of every candidate of the party conducting the activities, from federal candidates down to the local dog catcher. These activities may not, in fact, be authorized by a particular candidate, even though he would receive the benefits of them. If, on the other hand, any one or all of the above activities are carried out *on behalf of* a federal candidate, then those expenditures would go toward a candidate's ceiling.

> (B) an expenditure is made on behalf of a candidate . . . if it is made by—
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> (i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or
>
> (ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

18 U.S.C.A. § 608(c)(2)(B) (Supp. I, 1975).

[188] 393 U.S. 23, 31 (1968). *See also* Redish, *supra* note 65, at 919.

[189] *See* 32 CONG. Q. WEEKLY REP. 3084-91 (1974).

zation necessary for the election day contest with the incumbent. Rather, these challengers have a maximum of only $84,000 at their disposal with which to overcome the advantages of incumbency and to carry out their campaign activities. The ceilings imposed in the Campaign Act of 1974 hardly reflect the difficulty of such a challenge.

A final form of possible discrimination resulting from spending ceilings is that inherent in setting universal limits throughout the entire country, without taking into account local variances in cost of such vital campaign expenses as radio and television time.[190] A 30-second prime time television spot can vary from $200 in Phoenix to $4,600 in New York City.[191] By enacting the same ceilings for New York as for Phoenix, the people in the City of New York will be given far less opportunity to see and know their candidates than will the voters in Phoenix.[192] While this discriminatory aspect is most exemplified by media costs, the same is no doubt true, though to a lesser extent, of printing costs, newspaper advertising, and salaries. The difficulty of arriving at a fair ceiling for each region of the country presents another difficulty in enacting spending ceilings.

The discriminatory effects of spending ceilings on campaigns thus fall into three categories: (1) A challenger may not be able to overcome the natural advantage of incumbency should an incumbent decide to spend the limit; (2) third-party candidates are discriminated against in that they generally lack the organizations available to major party candidates; and (3) challengers to incumbents in primaries face the disadvantage of having to defeat an incumbent with only $84,000 of expenditures.

Equal ceilings for challengers and incumbents will, in many cases, make it very difficult for a less well known challenger to present himself and his platform effectively before the electorate. If the Court should find that the limitations on free speech which result from ceilings on campaign expenditures fall hardest in their application upon the challenger, then this discriminatory effect can only be justified by some "compelling state interest" sought to be achieved by the legislation.[193] Although the purity of

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[190] *See* Fleishman at 467. *See generally Hearings on H.R. 7612* at 4 (Supp.).

[191] H. PENNIMAN & R. WINTER, *supra* note 19, at 14.

[192] *See* Note, *supra* note 56, at 661.

[193] The "compelling state interest" standard is applied where a fundamental interest is involved. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

the electoral process is an important concern, it cannot be said that this interest will necessarily be enhanced by ceilings placed on spending. The previous evaluation of the governmental interest promoted by these ceilings[194] should leave doubts in many minds as to whether *any* interest—other than that of incumbents—is really promoted by limits on campaign spending.

CONCLUSION

Reform of campaign funding is long overdue. Money has been and will continue to be the root of corruption and impropriety among elected officials. Until steps are taken which will assure the American public that political contributions are not given in order to extract political favors or gain political clout, the aura of suspicion which surrounds campaign contributions will continue to hang precariously over the American political process. Unfortunately, a problem which is so easily identified is not so readily cured.

The governmental interest in re-establishing some purity in our electoral process is as powerful an interest as can be conceived in our democratic society. If the method by which our leaders are chosen is tainted with potential or actual abuse, then the decisions these officials render must be suspect. Yet no matter how great the evil created and no matter how powerful the interest to be served, the solution relied upon must be consistent with the principles established in the Constitution. Absent constitutional problems, relatively simple answers might suffice. In the case of campaign reform, however, the first amendment requires a complex solution. A spending ceiling is an example of a simple answer, one which ignores the first and fifth amendments as well as political reality.

Suit has already been filed challenging the Campaign Act of 1974,[195] and one of the numerous causes of action is aimed at the ceiling on expenditures as a violation of the right to free speech and due process.[196] The purity of the electoral process is thus in the hands of the judiciary. In the long run, this purity might be better served by the elimination of a spending ceiling as a means to achieve it.

Robert W. Drake

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[194] *See* text accompanying notes 55-90 *supra*.

[195] 121 CONG. REC. S. 2014-20 (daily ed. Feb. 18, 1975). The suit has been filed in the United States Circuit Court of Appeals for the District of Columbia by Senator James Buckley and former Senator Eugene McCarthy.

[196] *Id.* at 2018.

NOTE

LEGAL ETHICS—REPRESENTATION OF DIFFERING INTERESTS BY HUSBAND AND WIFE: APPEARANCES OF IMPROPRIETY AND UNAVOIDABLE CONFLICTS OF INTEREST?

INTRODUCTION

One of the most noticeable changes in law schools in recent years has been the increase in the number of women enrolled.[1] In the beginning of the 1963 academic year, 1,883 women were enrolled in law schools approved by the American Bar Association,[2] constituting 3.8 percent of the total enrollment. In the fall of 1968, there were 3,704 women enrolled,[3] or 5.9 percent. By the 1973-74 school year, the number of women had grown to 16,760,[4] 15.8 percent.

One effect of the increased number of women in law schools is that more and more lawyers are married to other lawyers. Where lawyer-spouses are not associated in the practice of law, questions have arisen about the propriety of a lawyer's accepting employment on behalf of a client whose interests differ from those of a client represented by the lawyer's spouse or by that spouse's firm. These questions have been considered in ethics opinions issued by the bar associations of four states: Arizona,[5] Colorado,[6] Illinois,[7] and Virginia.[8] The Arizona and Illinois opinions are lim-

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[1] Ruud, *That Burgeoning Law School Enrollment is Portia,* 60 A.B.A.J. 182 (1974).

[2] *Id.* at 183.

[3] *Id.*

[4] *Id.*

[5] ARIZONA ETHICS COMM., OPINION No. 73-6 (Reconsideration of OPINION No. 71-27) (1973) [hereinafter cited as ARIZONA OPINION No. 73-6].

[6] Colorado Bar Ass'n Ethics Comm., *Opinion No. 52,* 3 COLO. LAWYER, Apr. 1974, at 55 [hereinafter cited as COLORADO OPINION No. 52]. Opinion 52 was adopted on February 9, 1974. Since its adoption, the ethics committee has voted to reconsider the opinion's holdings, but until a new opinion is issued the present one is considered in effect.

[7] ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION No. 311 (1968) [hereinafter cited as ILLINOIS OPINION No. 311].

[8] Letter from R. J. Lilliard, Chairman, Legal Ethics Committee, The Virginia State Bar, to a Grafton, Virginia, lawyer, Nov. 12, 1974, on file with Professor Cathy S. Krendl, University of Denver College of Law [hereinafter cited as Virginia opinion].

In addition to the ethics opinions on this subject, the Nevada Supreme Court rules forbid representation of conflicting interests by attorneys related in a number of different ways, including "consanguinity within the third degree." NEV. SUP. CT. R. 170. Although "consanguinity" does not include the marriage relationship, it is probable that any restriction of representation of conflicting interests by spouses in Nevada would be achieved by amendment of this court rule, and not by an ethics opinion.

ited to fact situations involving criminal cases; they hold that it is improper for one spouse to seek to represent a defendant prosecuted by the other spouse or by another member of the public office which employs the spouse.[9]

The Virginia opinion was in response to an inquiry concerning the propriety of a lawyer's representing one party to a divorce action when the other party is represented by the firm which employs the lawyer's spouse.[10] Because of wide interest in the subject, however, the Virginia Legal Ethics Committee, in addition to addressing the question posed, discussed additional situations, both those involving direct representation by lawyer-spouse against lawyer-spouse and those involving representation of opposing interests by the spouses' firms.[11] The committee concluded that representation in which one spouse is actively involved against the other spouse or the other spouse's firm is not ethically permissible.[12] So long as neither spouse is directly involved, according to the committee, representation of opposing clients by the two firms is permissible.[13]

Colorado's opinion is similar to that adopted in Virginia, except that it includes consideration of the propriety of a lawyer's representation of a defendant in a criminal case prosecuted by a district attorney's office which employs that lawyer's spouse.[14] The opinion's conclusion coincides with that of the Virginia Legal Ethics Committee: It is not proper for a lawyer to accept employment by a client whose interests differ from those of a client of the lawyer's spouse or a member of the spouse's firm;[15] it is proper for the firms to represent clients with differing interests so long as neither spouse participates in the representation.[16]

One result of the ethical questions raised by the representation of the opposing sides of pending legal matters by spouses might be a reluctance on the part of law firms to hire any applicant for a job if the applicant's spouse is employed by, or seeking law-related employment with, another law firm in the same com-

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[9] ARIZONA OPINION No. 73-6 at 1; ILLINOIS OPINION No. 311 at 1.
[10] Virginia opinion at 1.
[11] *Id.* at 2.
[12] *Id.*
[13] *Id.*
[14] COLORADO OPINION No. 52 at 55.
[15] *Id.* at 56.
[16] *Id.* at 57.

munity. That such a reaction by employers is a reality is indicated by a rule adopted by the Committee on Placement at Harvard Law School stating that employers who use the school's placement office for interviews may not refuse to hire an applicant merely because the applicant's spouse is or will be a lawyer in the same town.[17]

> The Committee concluded . . . that the likelihood of unprofessional conduct . . . is insufficient in these situations to justify the substantial hardship worked on married couples by a policy of refusing to hire a lawyer whose spouse works for another firm in town.[18]

Where a law firm's recruiting policy is supported by an ethics committee opinion, married couples face a greater likelihood that one or both of them will have difficulty finding employment in the same community.[19] For instance, if one spouse obtains a position with a state or local prosecuting office, the other may find it impossible to work in criminal defense matters, at least in that jurisdiction. Or, if both spouses are interested in, for example, commercial law, and seek employment with firms specializing in that area, they may face great unwillingness on the part of such firms to risk the possibility of creating a conflict of interest between themselves and other firms which they frequently encounter in litigation. The married lawyers may find that they must choose to work in greatly dissimilar fields of law, or to live where each may work in a different city, or to enter practice in the same firm, their own or an established one without a policy against hiring close relatives. "Substantial hardship" seems an apt description of such results.

Even if the lawyer-spouses are able to find employment with different law firms, ethics opinions like those described previously may present clients of their firms with difficult circumstances. For instance, if a lawyer represents a bank in making a construction loan to a client represented by the lawyer's spouse, may granting of the loan be made contingent upon the borrower's obtaining different counsel in order to avoid possible charges of conflict of interests? If the borrower does retain a different lawyer solely to complete the loan transaction, how may the new

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[17] Memorandum from Ass't. Dean Russell A. Simpson, Law School of Harvard University, to Interviewers Regarding Placement Office Rule 5, September 30, 1974, on file at Harvard [hereinafter cited as Simpson Memorandum].

[18] *Id.*

[19] *See* text accompanying notes 125-26, *infra*.

lawyer comply with the lender's request for a statement by the borrower's general counsel (presumably the first firm) that the transaction will not be jeopardized by any of the other business dealings of the borrower?

In addition to the impact of these opinions on lawyers and clients, adoption and enforcement of such opinions at this time may subject bar associations to criticism because the effect of the opinions may be harsher on women's prospects for employment than men's. Such criticism might note that, in general, wives complete their career education after their husbands.[20] Thus, generally the husbands are employed as lawyers before an actual conflict arises, and it is the wives who must face the restrictions on hiring which stem from the marriage relationship. The Arizona Ethics Committee took note of this pattern in Arizona Opinion 73-6, a reconsideration of an earlier, more restrictive opinion.[21] The committee reconsidered the first opinion at the request of the Board of Governors of the Arizona Bar Association, and the request was prompted, at least in part, by recognition that "the restrictive position therein taken may adversely affect the employment opportunities of women lawyers who are increasing in number and who have never had an easy time of it in our profession."[22]

The harshness of the opinions considered here on married lawyers is accentuated by the fact that few similar restrictions are placed on lawyers related to each other in different ways (for

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[20] *See* THE CARNEGIE COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION (1973). This study of American graduate and professional students found a marked difference in the age distribution of men and women; in particular, about one-fourth of the women students were married, divorced, or separated and 35 or older. *Id.* at 83-4. Data in the study indicated that more than one-half of the married women graduate students, as opposed to only one-fourth of the married men, had spouses attending graduate school or who had attained a graduate degree, suggesting "that women who are married to graduate students or to men who have attained a graduate degree are especially likely to seek graduate education." *Id.* at 85. In the case of medical students, the Commission reported that more than one-half of women who obtain M.D. degrees are married to physicians. *Id.* at 24, *citing* Powers, Parmelle, & Wiesenfelder, *Practice Patterns of Women and Men Physicians*, 44 J. MED. ED. 481, 482 (1969). Although no similar study could be found involving women law students, it seems reasonable to assume that a significant number of women now receiving the J.D. degree are married to lawyers.

[21] ARIZONA ETHICS COMMITTEE, OPINION NO. 71-27 (1971). This opinion concluded that, where a husband was regularly employed and engaged in prosecuting criminal cases, his wife could not accept and defend cases prosecuted by the husband or any other member of his office, and neither could any other member of the wife's firm.

[22] ARIZONA OPINION NO. 73-6 at 4.

example, parent-child), or on their firms.[23] Certainly, one must not minimize the importance of avoiding the harm to the profession and the public which could result from representation of opposing clients by lawyers married to each other. However, in view of the consequences described above, it is necessary to scrutinize carefully ethics opinions in this area to determine if their objectives of giving valid guidance to lawyers in such situations may be achieved without such a harsh impact.

Because the Colorado and Virginia ethics committees have considered inter-spousal conflicts most broadly, this analysis will primarily focus on these two opinions. Consideration will be given to whether the opinions offer a consistent and logical application of the *Code of Professional Responsibility*,[24] and whether they violate the due process and equal protection clauses of the U.S. Constitution. Finally, alternative approaches will be suggested for dealing with possible conflicts of interests between lawyer-spouses, approaches more in harmony with the *Code* and with the Constitution.

I. THE CODE OF PROFESSIONAL RESPONSIBILITY

Colorado's Opinion 52 is based on three hypothetical fact situations involving Lawyer A and Lawyer B, husband and wife not associated in the practice of law.[25] In the first situation, Lawyer A seeks to represent a client whose interests differ from those

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[23] *See*, O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970), under index heading "Conflict of interests, relatives." *E.g.*, where son is a substitute justice in civil and police courts, whether his father-partner may practice in those courts is a local problem which must be considered on the merits of each case. *Id.* ¶ 4440 (The Virginia State Bar). Many opinions have held it proper for a father to defend in a criminal case prosecuted by his son. *E.g.*, *id.* ¶ 1047 (Kansas Bar Ass'n); ¶ 1434 (The Missouri Bar); ¶¶ 3103, 3171, 3332 (North Carolina State Bar).

After Opinion 73-6 was issued, the Arizona ethics committee considered the case of an attorney whose father-in-law was a member of a zoning board which passed a regulation being challenged by a client of the son-in-law's firm. The committee ruled that so long as the relationship between the lawyer and the board member was disclosed to the client and the client consented it was proper for the firm to accept the employment. ARIZONA ETHICS COMM., OPINION No. 73-19 (1973).

> The main thrust of this particular point is the integrity and the honesty of the lawyer involved, to himself and to his client. So long as there is complete disclosure and acceptance by the client, there is no harm done.

Id. at 4.

[24] ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971) [hereinafter cited as ABA CODE].

[25] COLORADO OPINION No. 52 at 55.

of a client represented by Lawyer B.[26] In the second situation, Lawyer A seeks to defend a client prosecuted by a district attorney's office which employs Lawyer B.[27] In the third, Lawyer C, a member of Lawyer A's firm, seeks to represent a client with interests different from those of a client represented by Lawyer D, a member of Lawyer B's firm.[28]

The Virginia ethics opinion also considers three hypothetical situations: 1) Lawyer-spouse against lawyer-spouse, each actively involved in the same case; 2) lawyer-spouse actively participating in a case against lawyer-spouse's firm; 3) lawyer-spouse's firm against lawyer-spouse's firm, neither spouse directly involved.[29] The second and third situations are applications of the principle of "vicarious disqualification,"[30] a concept also considered in Opinion 52's third fact situation.[31] Although the Virginia opinion does not specifically discuss the question of representation in a criminal case, as does the Colorado opinion,[32] that question is really only a more specialized version of the spouse-against-spouse and spouse-against-spouse's-firm questions decided by the Virginia committee.[33]

In analyzing the two opinions, this section will discuss the committees' treatment of the direct confrontation of lawyer-spouse against lawyer-spouse, and the extension of the principles developed therein to representation by one spouse's firm against the other spouse's firm. Finally, additional problems which arise when one spouse is employed by a public prosecutor's office will be analyzed with reference to the opinions from Arizona and Illinois.

A. *Lawyer-spouse Against Lawyer-spouse*

In considering whether there is a conflict of interest when husband and wife represent clients with differing interests, the

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[26] *Id.* In the *Code of Professional Responsibility* the phrase "differing interests" is defined as including any interest that will have an adverse effect on the judgment or loyalty of a lawyer to a client, "whether it be a conflicting, inconsistent, diverse, or other interest." ABA CODE, Definitions.

[27] COLORADO OPINION No. 52 at 55.

[28] *Id.*

[29] Virginia opinion at 2.

[30] *See* ABA CODE Disciplinary Rule [hereinafter DR] 5-101, and authorities cited therein, n. 29; DR 5-105(D).

[31] COLORADO OPINION No. 52 at 55, 57.

[32] *Id.* at 55, 56.

[33] Virginia opinion at 2.

Colorado Bar Association's Ethics Committee looks at what it considers "the realities of the marital relationship and the possibility at least that the domestic and professional responsibilities of lawyers A and B may be on a collision course when they represent conflicting interests."[34] Given the possibility of such a conflict, the committee finds the situation covered by the following provision of the *Code:*

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.[35]

In spite of the provision for consent in DR 5-101(A), the ethics committee decides that consent may not be given to the representation of conflicting interests by husband and wife because it "gives rise to such an appearance of impropriety . . . that such representation should be scrupulously avoided."[36] To support its position that consent is not available to allow employment of lawyers in matters which may conflict with their personal interests, the committee quotes the following statements from Drinker's treatise on legal ethics:

> The Canon does not sanction representation of conflicting interests where such consent is given, but merely forbids it *except* in such cases. The American Bar Association has acquiesced in numerous decisions of its Ethics Committee construing the exception as not exclusive and consent is unavailable where the public interest is involved. There are, also, certain cases in which such representation is improper or at least unwise even with consent.[37]

It is worth noting, however, that the Drinker statement cited comes from a discussion of the consent exception to Canon 6 of the old Canons of Professional Ethics,[38] which differs significantly from the comparable sections of the *Code*.[39] Canon 6 began with a requirement that, before accepting employment, a lawyer disclose any interests or relationships he has to the parties or subject matter of the employment. It then continued, "It is unprofessional to represent conflicting interests, except by express consent

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[34] COLORADO OPINION No. 52 at 55.

[35] ABA CODE DR 5-101(A) (footnote omitted).

[36] COLORADO OPINION No. 52 at 56.

[37] *Id., quoting* H. DRINKER, LEGAL ETHICS 120 (1953).

[38] ABA CANONS OF PROFESSIONAL ETHICS No. 6 [hereinafter cited as CANON 6].

[39] ABA CODE DR 5-101; DR 5-105.

of all concerned given after a full disclosure of the facts."[40] Thus, the Drinker excerpt which appears in Opinion 52 refers to representation of opposing interests by one lawyer, the situation considered in present disciplinary rule 5-105.[41] This excerpt does not refer to the consent exception to representation of an interest which conflicts with the lawyer's personal interests, now covered in disciplinary rule 5-101(A).[42] Furthermore, immediately following the excerpt cited in Opinion 52, the Drinker text continues:

> There are, however, not infrequently cases in which it is highly desirable and to the advantage of everyone concerned that the same lawyer should, at the desire of both parties, represent them both.[43]

Professor Drinker continues:

> In order that mutual consent be effective, full disclosure must, of course, be made and the effect of the dual relationship fully explained to both parties. Also, all parties concerned must consent, a majority not being enough.[44]

There are, of course, situations in which a lawyer's personal interests would conflict so strongly with those of his client that representation would be improper even with the client's consent.[45] However, in Opinion 52 the ethics committee decides that consent can be made unavailable to allow direct representation of opposing clients by lawyer-spouses simply because of appearances of impropriety which might result. To support this limitation of consent, the committee refers to the *Code* requirement that "[a] lawyer should avoid even the appearance of profes-

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[40] CANON 6.

[41] ABA CODE DR 5-105(C).

[42] *Id.*, DR 5-101(A).

[43] DRINKER, *supra* note 37, *citing* Strong v. International B.L. & I. Union, 82 Ill. App. 426, 431 (1898); Eisemann v. Hazard, 218 N.Y. 155, 159, 112 N.E. 722, 723 (1916); Taylor v. Vail, 80 Vt. 152, 161, 66 A. 820, 823 (1907).

[44] DRINKER, *supra* note 37, at 121 (footnotes omitted).

[45] Charles R. Frederickson, Chairman of the Colorado Bar Association's Ethics Committee, has stated that the committee assumed consent by the parties in the following hypothetical situation when considering the spouse-against-spouse fact pattern: A is lawyer for an insurance company, paid a regular salary. A's spouse, B, represents the plaintiff in a $500,000 damage suit against the company A represents. B is paid on a contingent fee basis. Address by Charles R. Frederickson to a Denver Bar Association topical luncheon, in Denver, Dec. 11, 1974. Certainly, consent to such representation, if it could be demonstrated, would not suffice to make the representation acceptable under the *Code*. However, a finding that such a conflict was improper would not be based only on appeals to appearances of impropriety, but on the facts, which reveal the kind of conflict with personal financial interests which would be unacceptable whether the lawyers involved are husband and wife, parent and child, or related in other ways.

sional impropriety."[46] Specifically quoted is the following ethical consideration:

> Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to a layman to be unethical. . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.[47]

The ellipses in the material quoted in Opinion 52 mark the omission of several sentences which significantly change the impact of Ethical Consideration 9-2:

> In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism.[48]

Thus, the cited *Code* provision in fact applies to the "champion of an unpopular cause," and not to lawyers whose professional actions are misinterpreted by some members of the lay public, even though the lawyers are acting in accord with the "explicit ethical guidance" available in the *Code* for dealing with questions of conflict of interests.[49]

While the Colorado opinion relies on a finding of appearances of impropriety, even where no actual conflict may exist,[50] the Virginia opinion is based on a finding of actual conflict. The Virginia committee states that it is "most reluctant to conclude

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[46] ABA CODE Canon 9.

[47] *Id.* Ethical Consideration [hereinafter EC] 9-2, *cited in* COLORADO OPINION No. 52 at 56.

[48] ABA CODE EC 9-2.

[49] *See, e.g.*, ABA CODE DR 5-101; DR 5-105; EC 5-1 to 5-3; EC 5-14 to 5-17; EC 5-19; EC 5-21; EC 5-22.

[50] This is not to impute improper intentions to any lawyer, nor to ignore the fact that in many marriage situations *no actual conflict would exist.* COLORADO OPINION No. 52 at 55 (emphasis added).

> We are of the opinion that Fact Situation 1 gives rise to such an appearance of impropriety, *even though such impropriety may not in fact exist,* that such representation should be scrupulously avoided.

Id. at 56 (emphasis added).

that under no circumstances would [such representation] be proper."[51] Examples of situations that might be proper, according to the committee, are representation in a completely uncontested matter after full disclosure and consent, and representation by married lawyers who are in fact legally separated. The committee continues, however:

> Even these situations give rise to problems but the Committee is not prepared to say that such representation is improper *per se*. . . . [T]he Committee feels that these instances would be so isolated that it should be enunciated as a general rule that representation under these circumstances is in violation of the Code of Professional Responsibility.[52]

In support of this rule, the committee cites the following *Code* provisions: 1) Every client's right to his lawyer's totally independent judgment and undivided loyalty;[53] 2) a lawyer's duty to guard zealously against any personal interest or involvement which might impair dedication to his client's cause;[54] and 3) the client's right to feel free to discuss whatever he wishes with his lawyer without any question of the lawyer's integrity in keeping the client's confidences inviolate.[55] "To allow a husband and wife to advocate opposing positions in the same controversy . . . tends to compromise these well-established principles of professional ethics."[56]

The committee also notes that the public considers the marital relationship uniquely close, and states that allowing representation of differing interests by lawyer-spouses would be to approve an appearance of impropriety "in derogation of Canon 9."[57] Clearly the Virginia committee finds the likelihood of actual impropriety in representation of opposing clients by lawyer-spouses much greater than does the Colorado committee.

Furthermore, reliance by both committees on the need to avoid appearances of impropriety may be contrary to some recent court decisions in which the concept has been considered. In *Coles, Manter & Watson, P.C. v. Denver District Court*[58] former

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[51] Virginia opinion at 1.
[52] *Id.*
[53] ABA CODE EC 5-1.
[54] *Id.* EC 5-2.
[55] *Id.* EC 4-1.
[56] Virginia opinion at 1-2.
[57] *Id.* at 2.
[58] 177 Colo. 210, 493 P.2d 374 (1972).

members of the public defender's office sought to represent certain defendants on a private basis at the request of their clients. The Denver District Court found the representation improper because of appearances that the lawyers had engaged in solicitation of clients or that they had previously mis-stated the defendants' indigency in order to qualify them for representation by public defenders. This decision was reversed by the Colorado Supreme Court, which found those appearances insufficient to justify interference with the defendants' right to the counsel of their choice. According to the court the proper remedy was not to disqualify the lawyers from the case, but to bring disciplinary proceedings against the lawyers based on evidence of *actual*, not *apparent*, violations of the *Code*.[59]

An even stronger statement against an overboard application of the concept of appearance of impropriety is found in the case of *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*,[60] in which the defendants moved to disqualify the plaintiff's lawyers because one partner in that firm had previously worked as an associate in the law firm representing the defendants. The defendants argued that the standard for vicarious disqualification should be set broadly, encompassing participation in suits against any interest ever represented by a previous firm by all partners and associates of that firm in order to avoid even the slightest appearance of impropriety.[61] In rejecting this contention, the court stated that such important considerations as the right of clients to counsel of their choice and the need to avoid restricting the careers of young lawyers required that disqualification be based on proof of actual work in specific cases by the former lawyer from which it would be reasonable to infer that he had gained information of value to his present client. "The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification."[62]

Colorado bases its disqualification of lawyers from cases in opposition to their spouses on grounds of avoiding appearances of impropriety, while observing that actual impropriety may not

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[59] *Id.* at 214, 493 P.2d at 375.

[60] 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975.

[61] 370 F. Supp. at 589.

[62] *Id.*

exist.[63] Virginia states that such representation may not be allowed because it will in fact compromise well-established ethical principles, although the committee offers no facts from which an inference of compromise of principles could be drawn, but bases its conclusions upon ideas held by "the public" about the nature of the marital relationship.[64] In effect both decisions disqualify married lawyers from certain representation on the basis of "unfounded charges of impropriety."[65]

B. *Lawyer-spouse's Firm Against Lawyer-spouse's Firm*

> It has been stated under the original Canons, under the present Code, and by numerous opinions of this Committee that what a lawyer cannot do because of ethical precepts neither his partner, associate, employee or co-shareholder may do.[66]

This principle of vicarious disqualification has also been applied by courts, particularly in actions where, for example, the plaintiff seeks to disqualify the defendant's lawyer because of a former association of that lawyer and the plaintiff's lawyer.[67] It has been embodied as a disciplinary rule in the *Code of Professional Responsibility* by an amendment adopted by the American Bar Association. Previously, disqualification of lawyers in an entire firm was required (as a minimum standard) only when one member of the firm could not accept employment because it conflicted with the interests of another client.[68] Under the amended rule, however:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or

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[63] *See* note 50 *supra*.

[64] Virginia opinion at 2.

[65] Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975.

[66] COLORADO OPINION No. 52 at 56, *citing* COLORADO BAR ASS'N ETHICS COMM., FORMAL OPINION No. 27 (1963), and ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 33 (1931).

[67] *See, e.g.*, Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975; Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). In *Laskey Bros.* the court states: "[A]ll authorities agree that all members of a partnership are barred from participating in a case from which one partner is disqualified." 224 F.2d at 826.

[68] If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

ABA CODE DR 5-105(D) (1971).

> any other lawyer affiliated with him or his firm, may accept or continue such employment.[69]

Both the Colorado and Virginia opinions have concluded that representation of clients with conflicting interests by husband and wife is not ethically proper, and that consent of the clients involved is not available to lawyers under such circumstances. Because they cannot obtain consent of their clients, the lawyers are required to decline the employment according to Disciplinary Rule 5-101(A).[70] Under the strict standard of vicarious disqualification described in the preceding paragraphs, one would assume that the lawyers' firms must also be unable to accept the employment.

Both opinions apply this strict standard to the situation in which one lawyer-spouse actively participates in a case against the other spouse's firm.[71] But both decline to rule that the two firms must refuse representation against each other so long as neither spouse participates in the matter, holding that such representation does not present such an appearance of impropriety as to require disqualification.[72] This reasoning fails to recognize that it is not an appearance of impropriety which requires firm disqualification, but the fact that one lawyer in the firm is precluded from accepting the representation because of ethical precepts.[73]

The anomaly created by the opinions is readily apparent. If the proper interpretation of the *Code* requires the conclusion that spouses cannot directly represent opposing interests, then a consistent interpretation of Disciplinary Rule 5-105(D) requires that

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[69] *Id., as amended,* March 1, 1974.

[70] *Id.* DR 5-101(A).

[71] COLORADO OPINION No. 52 at 56-57; Virginia opinion at 2.

[72] The simple fact that spouses practice with firms representing clients with conflicting interests shoud not automatically invoke the disqualification of DR 5-105(D) . . . . [T]he potential for an appearance of impropriety as proscribed by Ethical Consideration 9-2 is not great enough to ethically preclude representation.

COLORADO OPINION No. 52 at 57.

> Conclusion 3 [that the firms may represent opposing interests when neither spouse participates] was reached in recognition that in such cases the Committee cannot arbitrarily conclude . . . that an appearance of impropriety must necessarily result.

Virginia opinion at 2.

[73] *See* text accompanying notes 66 and 69 *supra*.

both firms which employ the spouses must decline that representation. The committees' reluctance to adopt this latter rule casts doubt upon the correctness of the former conclusion.

Obviously, applying a broad requirement of vicarious disqualification, as the *Code* seems to require, would produce very harsh results. The committees were correct in holding that such representation does not create serious appearances of impropriety. However, to reach this conclusion they had to misinterpret or ignore Disciplinary Rule 5-105(D). Recognizing the necessity for exercising great care in the prohibition of any kind of representation would avoid such inconsistency and obtain a result reasonable under both the *Code* and accepted principles of legal ethics. Such prohibitions should not be made on the basis of unsubstantiated claims of "appearances of impropriety."

C. *Representation Involving Public Office*

Opinion 52 concludes that it is improper for a lawyer to defend a person in a criminal case prosecuted by a member of the district attorney's office which employs the lawyer's spouse.[74] Although not specifically stated, presumably the committee would not permit representation directly against the lawyer's spouse, but would permit it by a member of one spouse's firm against a member of the other spouse's office.

Similar conclusions are drawn by the Arizona Ethics Committee.[75] That committee applies its opinion to any situation in which one spouse is a member of the staff of a public office engaged in criminal prosecution, and the other is a member of a firm engaged in private practice in the same community.[76] The committee holds that representation would be improper if either spouse is directly involved in the prosecution or defense.[77] It then sets forth strict guidelines for maintaining complete separation of the case from either spouse, and determines that, if those guidelines are complied with, other members of the private firm can defend in a case prosecuted by other members of the prosecuting office.[78]

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[74] COLORADO OPINION NO. 52 at 55, 56.
[75] ARIZONA OPINION NO. 73-6.
[76] *Id.* at 1.
[77] *Id.* at 12, 13.
[78] *Id.* at 14.

The Illinois opinion[79] was in answer to the question posed by a lawyer whose wife was an assistant state's attorney as to whether he could represent defendants prosecuted by his wife or another assistant in that office. The primary responsibility of the state's attorney was in domestic matters, but she did prosecute many misdemeanors and "an occasional" felony case.[80] The ethics committee said:

> We speak of husband and wife being united as one. How two people can live together as husband and wife while they are in the midst of contending with all the strength, energy and ability at their command as opponents in a lawsuit and particularly in a criminal case, is difficult to understand.[81]

The committee then found such representation improper, due to the fact that defendants might seek out the spouse in private practice, who might receive special consideration in the defense of the case.[82] On this basis, the committee held not only that the husband cannot represent defendants in criminal cases prosecuted by the state's attorney's office, but also that he cannot represent plaintiffs in civil cases involving a criminal violation, whether or not there is or has been a prosecution.[83] The opinion does not consider whether a lawyer associated with the husband could defend a person prosecuted by another member of the state's attorney's office, nor does it indicate how it might decide this question.

All three opinions find that the potential conflict presented when lawyer-spouses take opposite sides of a criminal case is not one which can be avoided by full disclosure and consent.[84] Arizona relies on the grounds that the state cannot consent to such representation, and that, even if it could, to do so would be to sanction an appearance of impropriety.[85] The Colorado committee says that consent is not available to sanction representation of conflicting interests in cases which involve the public interest.[86] The Illinois opinion finds consent unavailable because of the na-

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[79] ILLINOIS OPINION No. 311.

[80] *Id.* at 1.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 3.

[84] ARIZONA OPINION No. 73-6 at 5; COLORADO OPINION No. 52 at 56; ILLINOIS OPINION No. 311 at 2.

[85] ARIZONA OPINION No. 73-6 at 5.

[86] COLORADO OPINION No. 52 at 56, *citing* DRINKER, *supra* note 37, at 120.

ture of the conflict itself. That committee states that consent is designed to permit employment of a lawyer in a situation where the conflict of interests arises from separate, unrelated transactions, not from the very transaction in which employment is sought.[87] All these statements about consent apply a principle developed in the context of consent to representation of opposing clients by one lawyer to a different situation—conflict between the lawyer's personal and professional interests.[88]

A holding that, solely because of the marriage relationship, consent is unavailable to allow a lawyer to defend a client represented by the prosecuting office which employs the lawyer's spouse requires a conclusion that the private spouse's entire firm must be precluded from defense work against the public spouse's office. This situation was considered by the Philadelphia Bar Association Ethics Committee in 1961.[89] That committee concluded that the marriage relationship itself did not ethically preclude one spouse or the spouse's partners and associates from engaging in criminal practice, but that any situation which would impair the community's confidence in the administration of justice had to be avoided.[90] Such loss of confidence would be most likely, according to the committee, if the two spouses were directly involved in the matter, and might occur even if neither spouse were involved.[91] Ways to decrease the likelihood of such a loss of confidence include insulating both spouses from the case, and obtaining the defendant's informed consent to the representation.[92] This approach avoids a flat prohibition based on the marital status of the lawyers, and there is thus no requirement under the principle of vicarious disqualification that the private firm is barred from criminal defense work.

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[87] ILLINOIS OPINION NO. 311 at 2, *citing* ILLINOIS STATE BAR ASS'N, PROFESSIONAL ETHICS OPINION NO. 166 (1958). This opinion considered the question of whether full disclosure and consent would permit two lawyers in the same firm to represent opposite sides in the same matter, and concluded that it would not.

[88] *See* text accompanying notes 37-42 *supra*.

[89] PHILADELPHIA BAR ASS'N ETHICS COMM., OPINION NO. 61-3 (1961) [hereinafter cited as PHILADELPHIA OPINION NO. 61-3], *cited in* ARIZONA OPINION NO. 73-6 at 6. The Philadelphia committee considered whether a lawyer or his partners or associates are barred from representing criminal defendants when the lawyer's spouse is an assistant district attorney. A digest of its opinion appears in MARU, *supra* note 23, ¶ 4031.

[90] PHILADELPHIA OPINION NO. 61-3, *cited in* ARIZONA OPINION NO. 73-6 at 13.

[91] *Id.*

[92] ARIZONA OPINION NO. 73-6 at 14.

One may also limit the facts which reasonably support an inference that the criminal justice system has been impaired by a careful definition of the public spouse's official function. For instance, the Arizona committee states that, when its opinion refers to a member of a public prosecutor's staff which employs one spouse "we have reference *solely* to a lawyer actively engaged in the prosecution of criminal cases, and not to a lawyer whose duties pertain solely to matters other than criminal prosecutions (*e.g.*, a lawyer working solely on civil matters)."[93]

This approach is consistent with the attitude shown by the Colorado Supreme Court in a case involving charges of unethical conduct by lawyers who were or had been public employees. In *Medberry v. People*[94] a defendant appealed his conviction of murder on the ground that his trial lawyer was a county attorney in the county where the case was prosecuted and should have been disqualified. In rejecting this contention, the Colorado Supreme Court observed that the county attorney was employed to serve as adviser to the county commissioners, and took no part in initiating criminal proceedings. Therefore,

> [I]n defending one charged with crime, at least where the county has no interest beyond that ordinarily attaining, a county attorney does not represent conflicting interests nor serve two masters.[95]

If such careful consideration of a public official's function allows one lawyer to represent potentially conflicting interests, similar care should be taken in defining a lawyer's duties so as to allow the lawyer's spouse to accept such representation.

In conclusion, the Virginia and Colorado opinions apply a rule of consent which was developed with reference to representation of two clients with conflicting interests by one attorney in order to forbid representation of two such clients by husband and wife. Under DR 5-105(D), this prohibition requires that the lawyer-spouses' firms should also be disqualified from such representation. The opinions eschew such vicarious disqualification because representation of opposing interests by firms which employ lawyer-spouses does not present a sufficient appearance of impropriety. This conclusion, although correct, is inconsistent with the logical system of ethics presented by the *Code of Profes-*

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[93] *Id.* at 1.

[94] 107 Colo. 15, 108 P.2d 243 (1940).

[95] *Id.* at 19, 108 P.2d at 245.

sional Responsibility. The same result could be achieved in accord with the *Code* if the opinions permitted representation of conflicting interests by husband and wife or their firms after full disclosure to and consent by the clients.

Similarly, completely forbidding defense by one spouse of criminal cases prosecuted by the other solely because of their marital relationship should require that the private attorney's firm is precluded from defense work against the other spouse's office. Vicarious disqualification of married lawyers' firms can be avoided, however, by opinions which focus, not on the lawyers' status, but instead on public confidence in the criminal justice system and which prohibit facts which might decrease that confidence, as did the Philadelphia Bar Association's Opinion Number 61-3.[96] Such opinions could require insulation of lawyers with potentially conflicting personal interests from participation on either side of criminal cases, taking care to define the function of a lawyer in public office precisely so that such insulation is as narrow as possible.

II. THE CONSTITUTION

The opinions under consideration are subject to criticism not only because of their strained interpretations of the *Code of Professional Responsibility*, but also because there exist serious questions as to their constitutionality. Before those questions can be analyzed, however, one must determine whether the issuance of the opinions by the various ethics committees constitutes state action sufficient to activate the protections of the fourteenth amendment.

A. *State Action*

Governmental action sufficient to be subject to constitutional restrictions is most clearly found in the issuance of the Arizona and Virginia opinions. In each of those states, the bar association is an official arm of the state supreme court, created for the purpose of assisting in the regulation of the legal profession, and all lawyers admitted to practice must belong to the bar association.[97] In *Goldfarb v. Virginia State Bar*[98] the Court recog-

[96] *See* notes 89-91 *supra*, and accompanying text.

[97] ARIZ. REV. STAT. ANN. § 32-201 (1956) (creation of the Association); ARIZ. SUP. CT. R. 27(a) (membership requirements); VA. CODE ANN. § 54-49 (1974 Replacement Vol.).

[98] 95 S. Ct. 2004 (1975).

nized that the Virginia Bar was a state agency when acting within its statutory mandate, although holding that the ultra vires enforcement of a minimum fee schedule was not state action[99] for Sherman Act purposes.[100] Accordingly, the integrated bars' ethics opinions, unless untra vires, would constitute state action.

The Illinois State Bar Association is a private organization, and issuance of its opinion might initially seem to be private action. However, the inquiry and hearing divisions of the association's disciplinary committee are commissioned by the Illinois Supreme Court to serve on the court's disciplinary commission.[101] As commissioners, they are charged with investigating and hearing complaints against lawyers, and with recommending the disciplinary action to be taken by the supreme court in each case.[102] Given this official function of a part of the bar asociation in the discipline of attorneys, the opinions of its ethics committee on the same subject would arguably also constitute state action because of the committee's involvement with a state agency[103] in performing the public function of regulating the legal profession.[104]

The Colorado Bar Association is also a private organization, and it has no official function in the discipline of Colorado attorneys.[105] However, a variety of supposedly private activities have been found subject to constitutional restrictions.[106] No precise test for recognizing state action has been formulated, since "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[107]

One approach to the question of state action has been to

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[99] *Id.* at 2015.

[100] 15 U.S.C. §§ 1-7 (1970).

[101] ILL. SUP. CT. R. 753(a) (Supp. 1974).

[102] *Id.* 753(a)-(c).

[103] *Compare* Reitman v. Mulkey, 387 U.S. 369 (1967); United States v. Guest, 383 U.S. 745 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) *and* McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974).

[104] For cases recognizing that public functions might be sufficient to constitute state action, see Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

[105] Petition of Colo. Bar Ass'n, 137 Colo. 357, 365, 325 P.2d 932, 936 (1958).

[106] *See* Barrett v. United Hosp., 376 F. Supp. 791, 797 (S.D.N.Y. 1974), and cases cited therein.

[107] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

determine whether the state is so involved with the private activity as to make it subject to constitutional limitations.[108] The most recent cases applying the "state involvement" test have concentrated especially on whether the involvement amounts to governmental control of, or right to control, the nominally private action.[109] "Under this control standard state *ex officio* membership on policy-making bodies and state veto power over institutional decisions might be important factors."[110] In the context of this test, it is worth noting that the Board of Governors of the Colorado Bar Association is made up of lawyers representing different geographic regions of the state and representatives of such state organizations as the District Attorneys Association, the House of Representatives and State Senate, the County and District Judges Associations, the Court of Appeals, and the Supreme Court.[111] Also, on at least one occasion, the Colorado Supreme Court has reacted to an opinion of the bar association's ethics committee by stating that lawyers affected should ignore the opinion.[112] This is action tantamount to veto power over the committee's decisions, and therefore within the control test set forth in *Pendrell v. Chatham College*.[113]

The second approach courts have used in finding that nominally private action constitutes state action has been the "public function" test.[114] "[S]tate action exists where a private entity performs what would ordinarily be a municipal, governmental function. . . ."[115] One recent case applying this doctrine is *United States v. Wiseman*,[116] which held that private process servers performed a public function.[117] In *Dacey v. New York*

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[108] Cases cited note 103 *supra*.

[109] McDonald v. NCAA, 370 F. Supp. 625, 630 (C.D. Cal. 1974); Pendrell v. Chatham College, 370 F. Supp. 494, 498 (W.D. Pa. 1974).

[110] Pendrell v. Chatham College, 370 F. Supp. 494, 498 (W.D. Pa. 1974).

[111] *Colorado Bar Association 1974-1975 Administration*, 4 COLO. LAWYER 47, 48 (1975).

[112] Address by Charles R. Frederickson, *supra* note 45.

[113] 370 F. Supp. 494, 498 (W.D. Pa. 1974). *See* text accompanying note 110 *supra*.

[114] Cases cited note 104 *supra*.

[115] Pendrell v. Chatham College, 370 F. Supp. 494, 497 (W.D. Pa. 1974). *See* Barrett v. United Hosp., 376 F. Supp. 791, 798 (S.D.N.Y. 1974), *citing* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).

[116] 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971).

[117] *Id.* at 796, *citing* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

County Lawyers' Association[118] the author of the book *How to Avoid Probate!* sued the New York County Lawyers' Association for denial of his civil rights.[119] Dacey charged that the Association's petition to adjudge him in contempt for unlawful practice of law was an attempted abridgement of his rights to freedom of speech and press.[120] The Second Circuit applied the doctrine of judicial immunity to the suit by Dacey, noting that "when the Association instituted its proceedings against Dacey, its role was analogous to that of a public prosecutor."[121]

Many cases have found that the practice of law is a public function.[122] The Colorado Supreme Court has held that restraint of illegal practice of law benefits both the legal profession, by protecting lawyers' private interests in having business, and the general public, by protecting lay people from the harm of having unqualified people act as lawyers.[123] In the context of disbarment proceedings, the same court has stated, "It is the privilege, if not the duty, of every attorney to call to the attention of this court any act of a licensed attorney which may fairly be considered to disqualify him."[124]

In addition to formal regulation of the legal profession by the courts, most state bar associations issue opinions like those under consideration interpreting the ethical rules for their members.[125] Although such opinions may not have final authority,

> [they] do have a considerable informal force. There are no scientific studies to prove this, but bar executives and officers, Ethics Committee members, and others with experience have repeatedly stated that this is so.[126]

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[118] 423 F.2d 188 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970).

[119] The suit was brought under 42 U.S.C. § 1983 (1970).

[120] The Association's petition was eventually dismissed. New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967).

[121] 423 F.2d at 192.

[122] *See, e.g., In re* Lavine, 2 Cal. 2d 324, 327-28, 41 P.2d 161, 162 (1935); *In re* Thomas, 16 Colo. 441, 446, 27 P. 707, 708 (1891); People *ex rel.* Chicago Bar Ass'n v. Johnson, 344 Ill. 132, 143, 176 N.E. 278, 282 (1931).

[123] Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 409, 312 P.2d 998, 1003-04 (1957).

[124] People *ex rel.* Colo. Bar Ass'n v. Class, 70 Colo. 381, 384, 201 P. 883, 884 (1921) (dictum).

[125] MARU, *supra* note 23, at 1.

[126] *Id.* at 2-3. Following this statement, Maru cites several authorities, including D. Sears, then Chairman of the Ethics Comm., Colo. Bar Ass'n, in 33 TENN. L. REV. 145 (1966).

In Colorado the present rules of procedure for the discipline of attorneys[127] were drafted by the grievance committee of the Colorado Bar Association and submitted by its Board of Governors to the Colorado Supreme Court, which adopted rules "substantially the same" as those submitted to it.[128]

In summary, state officials with the power to discipline attorneys have been involved to a considerable extent with the Colorado Bar Association, as evidenced by their representation on the organization's Board of Governors and by the fact that, on at least one occasion, the supreme court has, in effect, vetoed an opinion issued by the association's ethics committee.[129] Moreover, given the attitude that regulation of the practice of law is a public function,[130] participation in that function by the bar association in such ways as drafting rules of procedure for the discipline of attorneys and issuing opinions on questions of professional ethics adds support to a finding that the issuance of Colorado's Opinion 52 constitutes state action.[131]

If the opinions under consideration are deemed to constitute state action, they are subject to the restrictions imposed on the states by the fourteenth amendment. The effect of the opinions may be considered under four aspects of constitutional rights: The burden on a lawyer's choice to marry another lawyer;[132] the restriction of the lawyer-spouses in the exercise of their rights to work in the occupations they choose;[133] the interference with clients' rights to counsel of their choice;[134] and the use of an irrebuttable presumption that lawyers married to one another cannot zealously and professionally represent clients with differing interests.[135]

B. *Right to Marry*

The effect of an ethics opinion which absolutely precludes

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[127] COLO. R. CIV. P. Ch. 20.

[128] Molen, *Foreword* to COLORADO BAR ASS'N, THE PUBLIC AND PROFESSIONAL RESPONSIBILITIES OF LAWYERS AND JUDGES IN COLORADO at 4 (1957).

[129] Notes 110, 112 *supra*, and text accompanying notes 110-13 *supra*.

[130] *See* text accompanying notes 122-24 *supra*.

[131] Of course, if the opinion is used by the Colorado Supreme Court to discipline an attorney, state action would clearly be found, under the reasoning of Shelly v. Kraemer, 334 U.S. 1 (1948).

[132] *See* text accompanying notes 17-19, 23 *supra*.

[133] *See* text accompanying notes 17-19 *supra*.

[134] *See* text following note 19 *supra*.

[135] *See* text accompanying notes 63-65 *supra*.

representation of differing interests by lawyers married to each other is to penalize a lawyer's choice to marry another lawyer. A lawyer may find, for example, that he is unable to represent defendants in criminal cases because his wife is an assistant district attorney. Or both spouses may find themselves unable to obtain jobs, because prospective employers wish to avoid possible conflicts with other law firms in the community.[136] This harsh effect on lawyers related to each other by marriage is in striking contract to the relative leniency with which representation of differing interests by lawyers related in other ways is treated.[137]

The marriage relationship has long been conceded to occupy a protected position under the Constitution:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.[138]

A variety of state regulatory schemes have been found unconstitutional because of their effects on the marriage relationship: A state tax law under which income of the wife and children living with the husband was taxed as the husband's;[139] mandatory maternity leave rules for school teachers;[140] and laws forbidding use of contraceptives by married people.[141]

In addition to those schemes, anti-miscegenation statutes have been held invalid because they interfere with the freedom to marry.[142] In *Perez v. Lippold*[143] the California Supreme Court held that marriage is "a fundamental right of free men" which could not be infringed by the state except for important objectives and by reasonable means.[144] Furthermore, the court said:

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[136] *See* text accompanying notes 17-19 *supra*.

[137] *See* note 23 *supra*.

[138] Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Perez v. Lippold, 32 Cal. 2d 711, 715, 198 P.2d 17, 19 (1948).

[139] Hoeper v. Tax Comm'r, 284 U.S. 206 (1931).

[140] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[141] Griswold v. Connecticut, 381 U.S. 479 (1965).

[142] Loving v. Virginia, 388 U.S. 1 (1967); Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948).

[143] 32 Cal. 2d 711, 198 P.2d 17 (1948).

[144] *Id.* at 714, 198 P.2d at 18-19.

> Since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and therefore restricts his right to marry.[145]

Under this reasoning, the harsh effects which result from the opinions under discussion amount to a penalty on a lawyer's choice to marry another lawyer, and therefore restrict his or her right to marry. Certainly, the states' objective, protection of the public by prevention of conflicts of interests between lawyer-spouses, is important. Whether absolute preclusion of such representation by lawyers married to one another is a reasonable means to that objective is open to serious question.[146]

C. *Right to Work*

As already discussed, one effect of the opinions under consideration may be to close employment opportunities for lawyers, at least in certain fields within the profession.[147] To determine whether such an effect renders the opinions unconstitutional, it is necessary to examine the somewhat complicated line of cases in the area of the right to work.

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.[148]

However, the right to work is not an absolute one, and this is particularly true of what the Colorado Supreme Court has called "the learned professions," for which the state may require a license of one who wishes to practice.[149] Although the states may regulate admission to, or practice of, such professions in order to protect the public, they cannot do so "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."[150] At least one court has warned

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[145] *Id.* at 715, 198 P.2d at 19.

[146] *See* text accompanying notes 176-80 *infra*.

[147] *See* text accompanying notes 17-19 *supra*.

[148] Truax v. Raich, 239 U.S. 33, 41 (1915), *quoted in In re* Griffiths, 413 U.S. 717, 720 (1973). A similar view of the right to work as a fundamental right is found in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Van Zandt v. McKee, 202 F.2d 490, 491 (5th Cir. 1953); Battaglia v. Moore, 128 Colo. 327, 332, 261 P.2d 1017, 1020 (1953); People v. Love, 298 Ill. 304, 310-11, 131 N.E. 809, 811 (1921).

[149] People v. Painless Parker Dentist, 85 Colo. 304, 275 P. 928 (1929).

[150] Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957). *Cf. In re* Griffiths, 413 U.S. 717 (1973); Konigsberg v. State Bar, 353 U.S. 252 (1957); *Ex parte* Garland, 71

that standards of professional ethics must not be interpreted in such a way as "to unnecessarily circumscribe the career of a young professional. The Canons may not be used . . . to obtain the advantages of an implied restrictive covenant that would be of doubtful validity in any other employment situation."[151]

Although one may have a right to work as a lawyer which may not be infringed by the state, it is not as clear that one has a right to work as, for example, a criminal lawyer. A strong argument demonstrating the existence of such a right may be found in the case of *Prouty v. Heron*.[152] There, the plaintiff had been licensed as a professional engineer, without restriction. Thereafter, he sought renewal of his license, and was classified as a civil engineer. He sued to enjoin the Colorado Board of Examiners for Engineers and Land Surveyors from restricting his practice to that branch of the profession, and the injunction was granted. The Colorado Supreme Court ruled that he acquired a valuable right protected by the due process clause of the Colorado and United States Constitutions when he qualified for a license to practice without restriction under the standards prevailing at the time of his admission. "It follows, therefore, that the legislature cannot . . . deny or abridge that right in any manner except for cause," and then only in accordance with due process requirements.[153] The limitation on an engineer's right to practice all specialties within his profession is analogous to the restrictions which the opinions studied in this article impose on the practice of law by lawyers married to other lawyers. As with the opinions' effect on the right to marry, it is necessary to inquire whether the limitation on a lawyer's right to practice his profession is necessary to achieve an important state objective. While the importance of the state's objective is conceded, whether the means chosen is reasonable is doubtful.[154]

D. *Clients' Rights to Counsel of Their Choice*

As discussed above,[155] there are many situations in which

U.S. (4 Wall.) 333 (1866); Chenoweth v. State Bd. of Medical Examiners, 57 Colo. 74, 141 P. 132 (1913).

[151] Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 583 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975.

[152] 127 Colo. 168, 255 P.2d 755 (1953).

[153] *Id.* at 174-75, 255 P.2d at 758.

[154] *See* text accompanying notes 176-80 *infra*.

[155] *See* text following note 19 *supra*.

clients may undergo substantial hardship because of the opinions under consideration. This is particularly true in instances where one spouse is employed in a matter against the other spouse's firm, as, for instance, where the husband seeks to represent the buyer of a house who obtains a mortgage loan from a bank represented by the wife's law firm. The flat prohibition against representation of differing interests by lawyers married to each other may also work hardship in highly-specialized areas of law where relatively few lawyers with the required training and experience may be available. In such a field, the question of conflicts of interests may be complicated by the fact that attorneys may move from one firm to another as they gain experience in the field; it is thus instructive to review the doctrines which have developed regarding conflicts with the interests of clients of one's former firms.

In general, a former client need show only that the attorney representing his present adversary represented him in a matter substantially related to the present case, and such a showing will establish an irrebuttable inference that the attorney received confidential information of value to the adversary.[156] This inference becomes rebuttable, however, where the attorney is to be "vicariously disqualified"—for example, by virtue of his partner's former association with a firm which represents the client.[157] One reason given for allowing a lawyer to rebut the presumption is that the "effect of an over-harsh rule of disqualification must be to hinder adequate protection of clients' interests in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified. . . ."[158]

It is important to note that this recognition of the need to protect clients' interests in obtaining qualified counsel has arisen in the context of representation by an attorney which conflicts with the interests of another of his clients,[159] present or past. Certainly similar protection of that right should be offered for

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[156] Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 552 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

[157] *Id.*; Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 587 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975.

[158] Laskey Bros. v. Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955). *See also* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 583, 587 (E.D.N.Y. 1973), *aff'd*, Docket No. 74-1104, 2d Cir., May 23, 1975.

[159] ABA CODE DR 5-105.

clients where the representation conflicts with the lawyer's personal, financial, or property interests,[160] provided that the client gives informed consent to such representation. Protection of this right should not require a showing of special hardship such as lack of other qualified counsel to allow the client's knowledgeable choice of his lawyer to be honored.

E. *Conclusive Presumptions*

To the extent that the opinions absolutely forbid representation by a lawyer of interests which differ from those represented by his spouse solely because of the marital relationship they act as conclusive presumptions that the lawyers are not capable of professionally representing their clients.[161] The use of such a presumption of unfitness raises serious questions as to the opinions' constitutionality.

The classic discussion of the role of presumptions in statutory schemes is given by the Supreme Court in the case *Mobile, J. & K.C.R.R. v. Turnipseed*.[162] The Court there holds that it is permissible for a given regulatory scheme to allow or require an inference of one fact from evidence of another, without denial of due process of law, but only if

> there [is] some rational connection between the fact proved and the ultimate fact presumed, and [if] the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary matter. . . .
>
> If a legislative provision not unreasonable in itself prescribing a rule of evidence . . . does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.[163]

Thus, there are two approaches to challenging a presumption in a regulatory scheme. First, one may show that there is no rational relationship between the fact proved and the fact presumed. An example of this approach appears in *United States Department of Agriculture v. Murry*.[164] *Murry* involved a challenge to a rule which denied eligibility for food stamps to any person over 18 who was claimed in the previous year as a depen-

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[160] *Id.* DR 5-101.

[161] *See* text accompanying notes 63-65 *supra*.

[162] 219 U.S. 35 (1910).

[163] *Id.* at 43.

[164] 413 U.S. 508 (1973).

dent child for tax purposes by a taxpayer not in a household eligible for food stamps, and to all members of the dependent's household. The Court recognized Congress' interest in preventing abuses of the food stamp program by children of wealthy parents, particularly college students. However, it rejected the rule because the standard it set had no rational relation to the dependent child's present indigency or need for food stamps, and even less rationality as a measure of the need of other members of his household.[165] "It therefore lacks critical ingredients of due process . . . ."[166]

The second approach is to show that the presumption prevents a defense to the fact presumed by the one on whom it operates. This argument was advanced early in this century to overturn tax regulations which presumed conclusively that gifts made within a certain time before a taxpayer's death were in contemplation thereof and so were taxable as part of the donor's estate.[167] In rejecting such statutes, the Court said, "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."[168]

In recent years, the doctrine that conclusive presumptions violate due process by preventing a defense to the fact presumed has been applied by the Supreme Court to invalidate a number of legislative or regulatory schemes. *Carrington v. Rash*[169] involved a provision of the Texas constitution which denied the right to vote in state elections to a member of the Armed Forces not registered to vote in Texas prior to induction. Forbidding a soldier any opportunity to controvert the presumption of nonresidence "imposes an invidious discrimination in violation of the Fourteenth Amendment."[170] Similarly, suspension of a driver's license of a driver involved in an accident who failed to give proof of financial responsibility was found unconstitutional because the

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[165] *Id.* at 513.

[166] *Id.* at 514.

[167] Heiner v. Donnan, 285 U.S. 312 (1932) (federal statute applied to gifts within two years of death); Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (state law applied to gifts within six years of death).

[168] Heiner v. Donnan, 285 U.S. 312, 325 (1932). Note that present federal tax law contains a *rebuttable* presumption that gifts made within three years of death should be taxed as part of the decedent's estate. INT. REV. CODE of 1954, § 2035(b).

[169] 380 U.S. 89 (1965).

[170] *Id.* at 96.

statutory scheme did not consider whether the driver was in fact liable;[171] a regulation which allowed children to be taken away from their unwed father without a hearing on his fitness was struck down;[172] and a state regulation under which the classification of residency or non-residency for tuition purposes was unchangeable while the student remained enrolled in the state university was found void.[173]

Most recently, the Supreme Court heard a case involving rules which required pregnant school teachers to take unpaid leaves of absence upon reaching a designated month of pregnancy.[174] The school systems sought to justify their rules on the ground that they were protecting their interest in preventing unfit teachers from teaching. This interest was found legitimate, but the Court held that the challenged regulations swept too broadly, amounting to a conclusive presumption that all pregnant women are unfit to teach after a particular point of pregnancy. Under this reasoning, the regulations were found unconstitutional, because "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."[175]

The Colorado and Virginia ethics opinions are subject to challenge in both respects. By prohibiting representation of opposing interests by husband and wife, they prevent the lawyers from showing that there is in fact no conflict of interest, or that the clients have given informed consent to the representation. Furthermore, neither opinion suggests a basis in fact which would support an inference of professional misconduct from the fact that the lawyers are married to one another. Instead, both rely on "the public's" view of the marital relationship, without any attempt to demonstrate that "the public," or even a significant minority of it, holds such a view. Because the opinions lack ra-

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[171] Bell v. Burson, 402 U.S. 645 (1971).

[172] Stanley v. Illinois, 405 U.S. 645 (1972).

[173] Vlandis v. Kline, 412 U.S. 441 (1973).

[174] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In this case two lower court decisions were consolidated. One challenged a regulation which required a teacher to begin maternity leave after four months of pregnancy. LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971), *rev'd*, 465 F.2d 1184 (6th Cir. 1972). The other involved a rule requiring leave to begin after five months. Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), *rev'd*, 474 F.2d 395 (4th Cir. 1973).

[175] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644, *citing* Vlandis v. Kline, 412 U.S. 441, 446 (1973).

tional relationship between the fact proved and the fact inferred, and because they prevent any defense to the fact presumed, they are subject to challenge as invalid conclusive presumptions.

III. REGULATING CONFLICT OF INTERESTS BETWEEN SPOUSES

In determining whether it is necessary to forbid representation of conflicting interests by lawyers married to each other, one should consider whether there is an adequate system available to provide satisfactory discipline in any cases where the lawyers do in fact act improperly. This approach has been used by the U. S. Supreme Court in cases in which lawyers were denied admission to the bar. The Court has required a showing that exclusion of the individual or class of individuals is essential to accomplish the state's interest in maintaining high professional standards.[176] The same showing should be made before flatly denying a lawyer the right to accept a certain kind of representation, but the opinions under examination have failed to do so.

In Colorado the machinery for disciplining attorneys has recently been strengthened by a requirement that attorneys admitted to the bar and actively practicing in the state must pay an annual fee to defray the cost of disciplinary procedures against lawyers.[177] The system has been used frequently to discipline attorneys for a variety of unprofessional conduct.[178] Even if disciplinary proceedings are not brought, representation which presents a serious conflict of interest may be challenged by a party to a case through a motion to disqualify the attorney involved.[179]

In view of the unsatisfactory results which arise from the prohibition of representation by spouses of clients with differing interests, and the fact that suitable means to discipline lawyers who act unprofessionally in such a situation are available, the opinions' conclusions that consent may not be given to represen-

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[176] *In re* Griffiths, 413 U.S. 717, 727 (1973) (denial of admission to a resident alien). *See also* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[177] COLO. R. CIV. P. 227.

[178] People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971); People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971); People v. (Attorneys Respondent), 162 Colo. 174, 427 P.2d 330 (1967); People v. Selby, 156 Colo. 17, 396 P.2d 598 (1964); People *ex rel.* Colo. Bar Ass'n v. Ginsberg, 87 Colo. 115, 285 P. 758 (1930). *Cf.* Coles, Manter & Watson, P.C. v. Denver Dist. Ct., 177 Colo. 210, 493 P.2d 374 (1972), and text accompanying notes 58-59, *supra*.

[179] *See, e.g.*, Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 513 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959); Coles, Manter & Watson, P.C. v. Denver Dist. Ct., 177 Colo. 210, 493 P.2d 374 (1972).

tation which pits lawyer-spouse against lawyer-spouse or the spouse's firm is unnecessary. A better approach to the question of such representation could be made if the ethics committees had begun their inquiries with the following assumption:

> There is no reason to doubt that these are mature, capable individuals who will honor the *Code of Professional Responsibility*. Any . . . policy that, in effect, denies equal opportunity to either spouse on a contrary assumption should accordingly be discouraged, for it resists the new reality from which clients and the profession itself benefit that accords married men and women equal treatment.[180]

CONCLUSION

The author realizes that, at the present time, most clients' consent would probably result in restrictions similar to those set forth in the opinions under discussion. That is, most clients would consent to representation by the firms so long as neither spouse is involved; some clients would consent to representation by a lawyer against a client represented by the lawyer's spouse's firm; and only a few clients would knowingly consent to direct representation of conflicting interests by husband and wife.

The reader might inquire why the decision of clients is preferable to the holdings of the opinions if in fact it is likely that the effect of the two will be similar. One answer is that there is great value gained by achieving a result acceptable to lawyers and nonlawyers without sacrificing consistent application of the *Code of Professional Responsibility*. Furthermore, the number of lawyers married to other lawyers will continue to increase with the increased enrollment of women in law school, and that increase will no doubt be accompanied by greater acceptance of husband and wife lawyers as professionally responsible, competent individuals. Allowing clients who wish it the right to consent to representation of differing interests by husband and wife will allow smooth adjustment to that increased acceptance.

Nancy B. Calvin

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[180] Simpson Memorandum, *supra* note 17, at 3.

APPENDIX A

COLORADO OPINION No. 52
(Adopted February 9, 1974)

Syllabus

It is improper for a lawyer to represent a client having interests which differ from those of a client represented by the lawyer's spouse, and such impropriety may, but does not necessarily extend to members and associates of the firms with which each spouse is associated.

Facts

Lawyer A and Lawyer B are husband and wife. They are not associated in the practice of law.

1. Lawyer A seeks to represent a client whose interests differ from those of a client represented by Lawyer B.

2. Lawyer A seeks to represent a client being prosecuted by a district attorney's office which employs Lawyer B.

3. Lawyer C, a member of Lawyer A's firm, seeks to represent a client having interests which differ from those of a client represented by Lawyer D, a member of Lawyer B's firm.

Opinion

These fact situations raise the question of whether there is any conflict of interest when husband and wife represent clients having differing interests. Closely aligned are subsidiary questions of whether, if such conflict exists, it can be eliminated by full disclosure and consent by the clients or whether there is such an appearance of impropriety that the employment must be declined. Finally, these fact situations raise the question of whether the ethical obligation to decline employment must extend to members of a firm with which either spouse practices.

Our opinion recognizes the realities of the marital relationship and the possibility at least that the domestic and professional responsibilities of lawyers A and B may be on a collision course when they represent conflicting interests.

It takes little imagination to anticipate innumerable situations where either spouse might find it difficult to exercise professional judgment solely for the benefit of the client and free of personal considerations. This is not to impute improper intentions to any lawyer, nor to ignore the fact that in many marriage situations no actual conflict of interest would exist. It simply recognizes that this situation is generally fraught with great potential for conflict of interests. See particularly EC 5-21. Thus, to the extent that their clients' conflict may lead lawyers A and B into either domestic or financial conflict, one disciplinary rule immediately comes into play. DR 5-101(A) states:

> "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests."

For purposes of this opinion, we assume full consent from the clients. We note, however, that:

> "The Canon does not sanction representation of conflicting interests where such consent is given, but merely forbids it *except* in such cases. The American Bar Association has acquiesced in numerous decisions of its Ethics Committee construing the exception as not exclusive and consent is unavailable where the public interest is involved. There are, also, certain cases in which such representation is improper or at least unwise even with consent." Drinker, *Legal Ethics*, p. 120 (1953).

The question, therefore, is whether this conflict of interest, real or potential, may still allow for representation after consent is given. Obviously, without consent the proffered representation must be declined. The primary ethical consideration is whether such representation raises the appearance of impropriety. Ethical Consideration 9-2 reads:

> "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to a layman to be unethical. . . . When, explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

We are of the opinion that Fact Situation 1 gives rise to such an appearance of impropriety, even though such impropriety may not in fact exist, that such representation should be scrupulously avoided.

The same considerations are applicable where either spouse is in public office. Formal Opinions 14, 18, 45, 46 and 48. The additional ethical consideration which is applicable to Fact Situation 2 is EC 8-8, which states:

> ". . . . A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

See also ABA Opinions 34 and 186 and New York State Bar Opinion 149. Thus, we conclude that because of the public visibility of Lawyers A and B the relationship described in Fact Situation 2 is improper.

Fact Situation 3 involves the concept generally referred to as "vicarious disqualification." This concept is incorporated into DR 5-105(D), which states:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

This disciplinary rule and its associated ethical concepts support strongly the statements in the Preamble to the Code of Professional Responsibility that while ethical considerations are primarily "aspirational in character and represent the objectives toward which every member of the profession should strive," lawyers must nonetheless "with courage and foresight be able and ready to shape the body of law to the ever-changing relationships of society." Traditionally the opinions of this Committee and those of other state bar associations and the American Bar Association have construed the concept of "vicarious disqualification" broadly. It has been stated under the original Canons, under the present Code, and by numerous opinions of this Committee that what a lawyer cannot do because of ethical precepts neither his partner, associate, employee or co-shareholder may do. Formal Opinion 27 and ABA Opinion 33. We do not wish to change or affect this body of well-reasoned opinion. In our view, the same rationale which requires a lawyer to decline employment in Fact Situations 1 and 2 applies to either Lawyer C or D when the client is directly and personally represented by one spouse or the other. In other words, if Lawyer A's personal client has an interest which differs from that of a client of the firm in which Lawyer A's spouse practices, there would be a requirement to decline the employment. Even though the client's consent is obtained after full disclosure, this appearance of impropriety cannot be avoided.

The same rationale is inapplicable, in our opinion, where firm clients—as opposed to personal clients—have differing interests. The simple fact that spouses practice with firms representing clients with conflicting interests should not automatically invoke the disqualification of DR 5-105(D). Where the clients are fully informed of the situation and choose to consent to continued representation, the potential for an appearance of impropriety as proscribed by Ethical Consideration 9-2 is not great enough to ethically preclude representation.

Of course, we assume that neither spouse actually obtains information about the clients represented by the other spouse's firm as the result of the marital relationship. If either Lawyer A or B receives information inadvertently or otherwise by reason of the marital relationship, the confidences thus obtained must be preserved inviolate. See ABA Opinion 47.

APPENDIX B

Opinion letter from R.J. Lillard, Chairman, Legal Ethics Committee, The Virginia State Bar, dated November 12, 1974.

This is in response to your letter of March 29, 1974, regarding the propriety of a lawyer representing one party to a divorce action when the other party is being represented by a firm of which the lawyer's spouse is a member.

Since receiving your inquiry the Legal Ethics Committee has received several other inquiries and memoranda relating substantially to the same issue. In addition, we had appear before us at our meeting in Richmond on May 22, 1974, two young ladies whose presentations were most helpful. We have given all of this our most careful consideration.

The Committee is most reluctant to conclude that under no circumstances would it be proper for an attorney to represent one party to an action when the attorney's spouse represents the other party. Indeed, there could conceivably be circumstances where such representation would not be improper *per se;* for example, in a completely uncontested matter after full disclosure by both attorneys and acquiescence by the clients, or where the husband and wife attorneys are in fact legally separated. Even these situations give rise to problems but the Committee is not prepared to say that such representation is improper *per se*. However, the Committee feels that these instances would be so isolated that it should be enunciated as a general rule that representation under these circumstances is in violation of the Code of Professional Responsibility.

Every client has the right to expect his lawyer's totally independent judgment and undivided loyalty. (EC 5-1). Every lawyer should zealously guard against any personal interest or involvement which might impair in any way his total, unrestrained dedication to his client's cause. (EC 5-2). And every client must feel free to discuss whatever he wishes with his lawyer. There should be no question of his lawyer's integrity in keeping these confidences inviolate, and the client should feel no inhibition whatever in making such revelations to his lawyer. (EC 4-1). To allow a husband and wife to advocate opposing positions in the same controversy, in the opinion of our Committee, tends to compromise these well-established principles of professional ethics.

We recognize the wide interest in the subject of your inquiry and that to limit our response would leave related questions unanswered. Therefore, within the limits permitted by the ethical considerations cited above, DR 5-105 (A through D), and Canon 9, it is the consensus of our Committee that:

1. Lawyer-spouse against lawyer-spouse (i.e., each actively involved in the same case) is not ethically permissible, absent circumstances such as set out above.
2. Lawyer-spouse actively participating in a case against lawyer-spouse's firm is not ethically permissible, (your inquiry), again absent similar circumstances.
3. Lawyer-spouse's firm against lawyer-spouse's firm (neither spouse actively participating) is permissible.

Conclusions 1 and 2 were reached in recognition that the public generally considers the husband-wife relationship uniquely close, and that to hold otherwise would be to approve the appearance of impropriety in derogation of Canon 9.

Conclusion 3 was reached in recognition that in such cases the Committee cannot arbitrarily conclude either that an actual conflict of interest exists or that an appearance of impropriety must necessarily result.

NOTE

INTERNATIONAL ADOPTION — UNITED STATES ADOPTION OF VIETNAMESE CHILDREN: VITAL CONSIDERATIONS FOR THE COURTS*

> The law, therefore, through adoption makes it possible to provide these children with homes in which they will receive affection, care, and protection, from adoptive parents who will have a legal relationship that includes the same rights and responsibilities that exist between natural parents and their children.[1]

INTRODUCTION

State statutes which establish and protect the privilege of adoption permit adoption of foreign-born children by United States citizens. As a result, thousands of children orphaned or abandoned in South Viet Nam have been placed for adoption with United States families.

Because of delays involved, because of the special nature of the adoption of a Vietnamese child, and because the child has

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*At the printing of this note, May 1975, the state of the law under the recently changed leadership of South Viet Nam is uncertain. However, the laws referred to herein, whether they remain in effect or not, are the legal framework which governed international adoption of Vietnamese orphans in the Republic of Viet Nam under the leadership of President Nguyen van Thieu. For this reason, relevant portions of Vietnamese documents are cited and are included as an appendix to this note.

Although United States adoption of Vietnamese-born children is the frame of reference of this note, similar considerations are relevant with respect to any international adoption.

In Saigon, South Viet Nam, June 22 to July 3, 1974, this author inquired as extensively as possible about the legal and social status of orphaned and abandoned children. Among the many who were most helpful in spite of more pressing concerns with medical, nutritional, and daily care for the children, were: Margaret Moses and Rosemary Taylor, Saigon Director of Friends For All Children; Mr. Robert Chamness, Director of Holt Adoption Services, Saigon; Mrs. Nguyen thi Phuong, Social Worker, International Social Service, Saigon; Ms. Pat Weser, United States Embassy, Saigon; local orphanage directrices and workers in the Delta region and the environs of Saigon.

In the United States, Wende Grant, Director, and the staff of Friends For All Children, Boulder, Colorado, helped to make it possible to gather documentation necessary for treatment of this subject. Nguyen thi Xuan Huong, Vietnamese national and University of Denver graduate student; Connie Boll, Director of Friends of Children, Inc., and of the Rosemary Taylor Agency, both of Darien, Connecticut; and many parents of Vietnamese adopted children have shared their experiences and knowledge.

Further insight has been possible because of this author's work in Vietnamese adoption and in support programs for non-adoptable children in Viet Nam. With her spouse, she has been a party to the United States finalization of the adoption of a Vietnamese-born child.

[1] N.Y. DEP'T SOC. SERV., NEW YORK STATE LEGISLATION ON ADOPTION 5 (1972).

been brought to the United States upon petition for a final decree of adoption in a United States court, it may appear that the court's decision whether or not to grant the decree is somewhat after the fact. The child has been brought half-way around the world. He is probably receiving from the family who wishes to adopt him the most adequate diet, complete medical care, and psychological parenting he has ever known. The family, for its part, has been scrutinized by social workers, adoption agencies, United States immigration authorities, and the Vietnamese government. Nevertheless, the court's decision is crucially important to all the parties to the adoption.

The judge is the last and most authoritative determiner of the future of the parties to an adoption, domestic or international. The ruling of the court must be in the best interest of the child, and in violation of the rights of none of the parties. The final decree, if granted, must be unassailable by any later claims.[2]

In the case of adoption of a Vietnamese child by a United States family, the court's discretion and protection are particularly necessary for securing the child's best interest. The child has no counsel to represent him, and the agency which placed him with the family is most often geographically distant. The court has the authority to examine post-placement reports and to inquire about the family's adjustment.[3] Decrees must not be granted on the premise that even an unpromising future is better than abandonment. The number of applicants for Vietnamese infants far exceeds the number of available children.[4] These children, like all others, have a right to grow and develop under the best possible circumstances.[5]

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[2] The necessity for the decree to be unassailable is articulated in TENN. CODE ANN. § 36-101 (1955):

> [T]o protect them from interference, long after they have become properly adjusted to their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure.

[3] *E.g.*, IDAHO CODE § 16-507 (Supp. 1973).

> ORDER OF ADOPTION. — The judge must examine all persons appearing before him pursuant to the last section, each separately, and the report of the investigation provided pursuant to the last section and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

[4] Interview with Wende Grant, Director of Friends For All Children, in Boulder, Colorado, Oct. 25, 1974.

[5] Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/811 at 1 (1948); Declara-

A ruling which violates the rights of none of the parties, including those of the natural parents, and the granting of an unassailable final decree are interrelated concerns. If all prior rights to the child have been properly and legally terminated, the decree will be secure from later attack. Parties to the United States adoption of a Vietnamese child are entitled to this protection and final security of status just as are the parties to a domestic adoption.

If an adoption is effected pursuant to local statutes which do not contemplate the problems peculiar to foreign adoptions, there is a possibility that some rights will be violated. Among these are the child's right to the legal status (free for adoption) accorded him by the laws of his domicile and recognized by the United States Immigration Act,[6] and the right of the adoptive parents to protection from later extortion or unscrupulous claims that rights to the child were not properly terminated.[7]

Jeopardy to the rights of some parties or excessive protection of the rights of others is a distinct possibility when the petition is examined solely within the context of local procedural law. The majority of local statutes pertaining to adoption were not drafted in contemplation of transnational or transcultural adoptions. The substantive intent of the law for the benefit and protection of the parties may actually be violated by strict procedural application of the local statutes. If the court hearing a petition for adoption of a Vietnamese child will consider the vastly different cultural and legal circumstances from which the child so recently comes, and also appreciate the possible narrowness of its local statutes, the parties to the adoption will have the same protection and security of status that parties to domestic adoptions enjoy.

It is the purpose of this note to explore United States and Vietnamese adoption procedures, the cultural realities and legal

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tion of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. 16, at 19, U.N. Doc. A/OR/14/5/16 (1959).

[6] 8 U.S.C. § 1101 (G)(1)(F) (1965).

[7] *See* note 11 *infra* regarding protections for adoptive parents; CIVIL CODE OF THE REPUBLIC OF VIET-NAM, Decree-Law No. 028-TT/LSU, tit. 7, ch. 1 (1972) (official transl. Phuong Khanh Nguyen, Legal Processing Assistant, Far Eastern Law Division, Law Library, Library of Congress, August, 1974) [hereinafter cited as C. CIV. V.N.], arts. 248 to 251. The relevant portions of C. CIV. V.N. are included in the appendix to this note. *See also* the text accompanying notes 31 through 39 *infra* concerning social upheaval and possible ramifications for parties to an adoption.

system of Viet Nam, the statutory perspective of the United States courts, and to provide an added perspective for the court in light of these considerations.

I. UNITED STATES AND VIETNAMESE ADOPTION PROCEDURES: SIMILAR YET DIFFERENT

A. United States Adoption

The termination of all prior rights to the child and a final decree establishing a legal parent-child relationship between the child and the adoptive parents are the principal components of a United States adoption.[8] If the natural parents wish to give the child up, they may usually do so in a number of ways: by a release of custody to the new parents; by a release of custody of the child to an agency which then has the authority to make adoptive placement and release its custody to the new parents; by abandonment as defined by the law of the jurisdiction; or by judicial termination of parental rights as defined by the law of the jurisdiction.[9] In theory at least, in the United States, there is always some person or institution in custody of the child, and custody is traceable back to the birth certificate because recording and certification of the births of children are routine.

In the United States, potential adoptive parents who have received custody of the child petition the court for a final decree of adoption.[10] In hearing this petition, the court determines whether or not the placement is in the best interest of the child, establishes whether the child is indeed legally free for adoption, and attempts to protect the rights of all parties concerned.[11] The

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[8] *E.g.*, N.J. REV. STAT. §§ 9:3-24, 30 (1953). Termination of prior parental rights to the child and the decree of adoption are interrelated and part of the same proceeding. *In re* Adoption of Children by D., 61 N.J. 89, 293 A.2d 171 (1972), discusses the difficulties inherent in the interrelation of both steps. NEV. REV. STAT. § 127.110(2)(g) (1973) is an example of separation of the two steps: "[T]he petition for adoption shall state, in substance, the following: That there has been a full compliance with the law in regard to consent to adoption." The consent to adoption is a separate procedure which precedes a petition to adopt.

[9] *E.g.*, CAL. CIV. CODE § 224, Consent of Parents and Exceptions; § 224m, Relinquishment for Adoption (West Supp. 1974). These sections are an example of the legal definition of steps usually taken in giving up custody or parental rights.

[10] *E.g.*, IOWA CODE § 600.1 (1971).

[11] *See, e.g.*, TENN. CODE ANN. § 36-101 (1955):

> Purpose of chapter — Construction. — The primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have responsibility of their care and rearing, and to protect

court's determinations are facilitated by the above-mentioned custom of birth registration and by statutory controls over the form and manner of relinquishment and passage of custody from one party to another. Any "gap" in the legal history of a child born in the United States would indicate possible violation of the rights of a natural parent or some other legal quardian.[12] Concern

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them from interference, long after they have become properly adjusted to their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure.

The secondary purpose of this chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect foster parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter [shall] be liberally construed.

See also N.J. REV. STAT. § 9:3-17 (1960):

Public policy. This act shall be administered so as to give effect to the public policy of this State to provide for the welfare of children requiring placement for adoption and so as to promote policies and procedures which are socially necessary and desirable for the protection of such children, their natural parents and their adopting parents. To that end, it is necessary and desirable

(a) to protect the child from unnecessary separation from his natural parents, from adoption by persons unfit for such responibility, and from interference by his natural parents after he has been established in an adoptive home;

(b) to protect the natural parents from hurried or abrupt decisions to give up the child;

(c) to protect the adopting parents from assuming responsibility for a child without sufficient knowledge of the child's heredity and capacity for physical and mental development, and, having accepted a child for adoption, from later disturbance of their relationships to the child by the natural parents.

See also COLO. REV. STAT. ANN. § 19-1-102 (1973); N.C. GEN. STAT. § 48-1 (1966).

[12] *See, e.g.*, VT. STAT. ANN. tit. 15, § 435 (1974). These requirements for consent to the adoption of a minor are typical of the thoroughness of United States state statutes:

Consent to adoption of minor:

Except as hereinafter otherwise provided, if the person to be adopted is a minor, consent to the adoption shall be given, and the final adoption decree executed on the part of the minor, by both of his parents or by the surviving or sole parent. Such consent and decree shall be sufficient when given and executed:

(1) By one parent, if the other parent has abandoned the care and support of the minor, or is, in the opinion of the probate court, incompetent to have the care and custody of such minor;

(2) By the mother, if the minor is not born in lawful wedlock, or though such minor was born to a woman living in lawful wedlock, it is proved beyond

about this continuity of legal custody is well in keeping with the adoption hearing's purpose to protect the rights of all the parties.[13]

United States adoptions of Vietnamese children have appeared for finalization in significant numbers before United States courts in the past 5 years.[14] Although the legal formalities observed in the adoption procedure itself are similar, the course of a child's life from birth to adoption and the legal documenta-

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a reasonable doubt that the husband of such woman is not, by reason of nonaccess, the father of such minor;

(3) By the minor and his spouse, if the minor is married;

(4) By the guardian, if the minor is under guardianship;

(5) By the department of social and rehabilitation services, if the minor has no parent, guardian, husband or wife, or if the parents, guardian, husband or wife of such minor have abandoned his care and support or have left the state or, in the opinion of the probate court, are incompetent to have the care and custody of the minor;

(6) By the department of social and rehabilitation services of this state or its counterpart in another state, if the minor has been committed to the care and custody of such department by a court of competent jurisdiction without limitation in respect to adoption, or if the minor has been relinquished to it in accordance with applicable state law;

(7) By a child placing agency licensed or approved by the appropriate authority in this or another state if the minor has been committed to the care and custody of such department by a court of competent jurisdiction without limitation as to adoption, or if the minor has been relinquished to it in accordance with applicable state law;

(8) By the parent or parents as above provided, though one or both of such parents be minors, if such minor parents are, in the opinion of the probate court, of sufficient judgment and discretion to act for the best interest of such child to be adopted; otherwise consent shall be given and the decree executed by and in behalf of such minor parents as though such minor parents were being adopted; but in neither case shall the adoption be subject under provisions of section 454 of this title to being vacated at the instance of such minor parents after they become of age;

(9) By the department of social and rehabilitation services, if the minor has been adopted in a foreign country and if readoption is necessary in the United States, for the purpose of naturalization as a citizen of this country;

(10) By the department of social and rehabilitation services when so authorized by a public agency or licensed child placing agency of another state having jurisdiction of a child whose adoptive parents are residing in Vermont.

[13] *Supra* note 11. *See also* text following note 5 *supra*.

[14] Between July 1969 and July 1973, 6,400 United States visas were issued to Vietnamese-born children. Of those, 3,790 were granted citizenship at birth and acknowledged by American fathers. An estimated 2,640 entered the United States as immigrants awaiting adoption by United States families. USAID, Meeting on Placement and Adoption of Vietnamese Children in American Homes, 18 (1973).

tion of that period are quite different from what they would have been in the United States.

B. *Vietnamese Adoption*

In Viet Nam recording and certification of births are not routinely done. The natural mother may or may nor register the child at birth.[15] If natural parents are unable to provide for a child, it may simply be raised by the large, extended family unit to which they and the child belong.[16] The intervening circumstances of war, extreme poverty, and vice have perpetuated a climate wherein family units are weakened and often destroyed.[17] Thus, children are commonly given up by abandonment to the care of local orphanages, to unrelated persons, or simply deserted in public places. Formal relinquishment is possible, but seldom practiced.[18]

In the United States the adoptive parents initiate proceedings; under Vietnamese law any of the parties to the adoption may request an adoption hearing.[19] In that public hearing the court approves or rejects the adoption on the basis of two criteria: (1) Fulfillment of legal conditions; and (2) legitimate motivation for the adoption and its benefit to the child.[20] An adoption contract containing required consents and drawn in the presence of a notary at the residence of either the child or the adoptive parents must be submitted in a brief prior to the hearing.[21]

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[15] Customs with respect to birth registration vary. The date may indicate when the child began school, the date of conception, or the date when the child reached 1 year of age. Registration of birth is often done to attain a status such as student, aid recipient, or property holder.

[16] "[A]nd I asked her [the grandmother] what would the mother do with these children? And she said, 'Take care of them as long as we can. These are our children.' " *Hearings on Relief and Rehabilitation of War Victims in Indochina Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 2 *Orphans and Child Welfare* at 12 (1973) [hereinafter cited as *Rel. & Rehab. War Victims Hearing*].

[17] *See* MINISTRY OF SOCIAL WELFARE, REPUBLIC OF VIET-NAM, SOCIAL POLICY AND OPERATIONAL PROGRAMS ACCOMPLISHED BY THE MINISTRY OF SOCIAL WELFARE at 24; pt. IV at 31 (1968-71) [hereinafter cited as V.N. SOC. POL.].

[18] A semi-literate, destitute, or socially embarrassed mother is not likely to see the need to record her failure by identifying herself in a relinquishment.

[19] C. CIV. V.N. art. 254.

[20] *Id.*

[21] *Id.* art. 252.

C. *Differences Between United States and Vietnamese Adoptions*

The child's identity and his legal status as free for adoption must be established in adoption proceedings in both countries. This is accomplished by a birth certificate and a release of custody which are required to accompany the petition for adoption. Thus, the Vietnamese born, United States-adopted child comes before the court with the same documentation that is routine in domestic United States adoptions: a birth certificate or birth judgment, and a release of custody with consent to adoption.

The hidden difference is that these documents have been formulated in compliance with *Vietnamese* rather than United States law.[22] The Vietnamese birth certificate and release of custody to the adoptive parents have evolved from radically different cultural circumstances and from a legal system designed to serve people in those circumstances.[23] In Viet Nam the birth certificate may name a natural mother, and the release with consent to adopt may come from an orphanage, with no accounting for any span of time or termination of rights in the interim. Vietnamese law permits legal custody and the authority to release a child for adoption to originate in the institution sheltering a child.[24] Establishment of such authority in the institution caring for a child facilitates chances for betterment of the position of the orphaned or abandoned child. His best interest is served by legal allowances for the impossibility of exhaustive identification of someone in his circumstances whereas, in the United States, where the hardships of war, poverty, and vice do not exist to a similar extent, such a legal standard might violate the best interests of a child and only an exhaustive legal verification of his past may serve him best.

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[22] *Id.* arts. 247-51.

[23] We can understand that the Social Welfare policy of the Republic of Viet-Nam was worked out based on the Constitution of 1st April, 1967, especially on the following provisions . . . .
V.N. SOC. POL. at 5.

[24] C. CIV. V.N. arts. 249-52, 254 at appendix. By allowing establishment of authority to consent and powers of relinquishment over a child with no prior legal identity, Vietnamese law facilitates adoption or other benefits in spite of the impossibility of tracing his life history.

The Ministry of Social Welfare has articulated the government's concern: "The state advocates protecting the families, mothers and infants because the family is the foundation of society." V.N. SOC. POL. at 6. This concern is also evident in constant references to orphaned and abandoned children as "underprivileged elements" in Vietnamese society and needful of support.

II. The Cultural Realities and Legal System of Viet Nam

Some exploration of both the cultural realities and the legal system of Viet Nam is necessary to an articulation of considerations which could broaden a court's perspective in the application of local United States statutes.

A. *Cultural Realities*

Complete documentation of a social climate is difficult at best. These observations on Vietnamese culture and customs are carefully made after extended research with directors of Vietnamese orphanages, foreign agencies, adoption workers, embassy officials, missionaries, Vietnamese and French-Vietnamese citizens, and American parents familiar with the histories of their adopted Vietnamese children.

The family remains unsupplanted as the strong center of Vietnamese society. The Constitution of Viet Nam affirms its central importance.[25] The child is answerable to and watched over by everyone older in his family unit.[26] Adoption is not common even though it is encouraged by the government[27] in this time of war, upheaval, and extreme poverty. An adopted child under Vietnamese law immediately loses his right to the family altar and inheritance at the birth of a natural heir.[28] The importance of the family concept and the anomalous position of an adopted child is exemplified by a Vietnamese woman who explained the security and strength of the extended family unit while stating that she had eight natural children and one legally adopted *niece*, a term which illustrates the lesser status of adopted children in Vietnamese society.

Local orphanages in Viet Nam are shelters for children who have been orphaned or abandoned. The same religious order may often also provide extended care and day care for other needy children. There is recognized, however, a sharp distinction between orphans and children who have not been totally aban-

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[25] Constitution, Republic of Viet Nam art. 17 (1967) (V.N. Soc. Pol. transl. 1971). The State recognizes the family as the foundation of the society. The State encourages and assists in the formation of families, and cares for mothers and infants.

Id.

[26] Interviews with Nguyen thi Xuan Huong, University of Denver graduate student, in Denver, Colorado, Sept. 1974 and interviews in Saigon, Viet Nam, June 1974.

[27] V.N. Soc. Pol. at 29.

[28] C. Civ. V.N. arts. 261 & 262.

doned. It was explained to the author that recordation of vital statistics, such as marriage or legal relinquishment of custody of a child, have only recently become routine. People are semi-literate, well known to one another only within their communities, and unlikely to travel more than a few miles from home in a lifetime.[29] The head of an orphanage, however, is active in the community and known to all, and does have the means to ascertain the status of the children in the orphanage.

Orphanages are not casual about the release of children. Children are their reason for existence. Dark-skinned, racially mixed, deformed, handicapped, male, or desperately ill children are often those released for adoption. They are the ones with the least hope of integration into their communities; the least likely to find a means of livelihood to enable them to survive. Thus, the child who comes before United States courts for adoption has survived a process of somewhat negative selection within his native society.

Along with the disruption of the family unit and resultant traumas for children, there has been a simultaneous flourishing of the unsavory elements of society:

> The social evils are developing extensively and become an increasingly serious and complicated problem. War and poverty are the most favorable medium for the increase of vagrancy, juvenile delinquency, prostitution, use of narcotics and gambling. Preventive and eradication measures have been taken against those vices.[30]

There are large concentrations of orphaned or abandoned children in areas known for what the Ministry of Social Welfare terms "social evils."[31]

United States adoption statutes recognize and provide

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[29] Interviews with Mrs. Nguyen thi Phuong, Social Worker, International Social Service, Saigon, June 1974; and Nguyen thi Xuan Huong, University of Denver graduate student, Denver, Colorado, Sept. 1974.

[30] V.N. SOC. POL. at 31.

[31] There are 19 orphanages in Gia Dinh Province which includes the city of Saigon. The geographical region which includes Saigon has 39 percent of the total number of orphanages in the Republic of Viet Nam. 19.5 percent of them are in the region which includes the city of Da Nang. V.N. SOC. POL. at 26.

> Outside the door in Saigon, youthful human flotsam . . . scraping a pittance. . . . Some just beg; others steal or become prostitutes — and some, even the youngest, have turned to pushing drugs.

NEWSWEEK, May 28, 1973 at 53; also included in an extension of remarks inserted by Representative Mink, CONG. REC. 3428 (daily ed. May 24, 1973).

against black market practices in adoption.[32] These practices exist in Viet Nam as well and are not statutorily treated. In addition to having comparable motivations for profit, the potential Vietnamese opportunist is also a person in most dire straits, in whose environment it is accepted that the unscrupulous or desperate commonly, if illegally, sell children or derive income from their labors.[33]

Specific information commonly available in the United States which permits conclusive determination of identity and responsible advertisement of notice is not easily obtainable in Viet Nam. In the Vietnamese language certain names are more common than Smith or Jones are in English.[34] Vietnamese birth certificates do not commonly include details about parents' racial background, appearance, education, or occupation which would permit distinction between persons of the same name.[35] Established mailing addresses and identification comparable to social security numbers may be unavailable due to the present conditions in the country.

In light of these cultural factors[36] it is foreseeable that a mismanaged attempt to verify the authority to give consent, or

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[32] *E.g.*, TEX. REV. CIV. STAT. ANN. art. 695e (1974) Bringing Child into State for Placing; MO. REV. STAT. § 543.110 (Supp. 1967) Prohibiting Transfer of Custody of the Child: Penalty; MICH. COMP. LAWS § 722.108 (1973) Restrictions on Child Placing in Michigan.

[33] *Rel. & Rehab. War Victims Hearing, supra* note 15, at 17.

> SEN. KENNEDY. "[C]ould you talk just a moment about one of the problems that you have been aware of, as to how real it is, the fact that mothers actually sell children in Viet Nam."
>
> MR. KLEIN. "This is true, Mr. Chairman."
>
> SEN. KENNEDY. "And also the problem of abandoning children. Is this true?"
>
> MR. KLEIN. "This is true, Mr. Chairman."

Statement of Mr. Wells Klein, Executive Director, American Council for Nationalities Service, New York, and Member of the Kennedy Study Mission to South Viet Nam. Regarding parents' deriving income from their children's labor *see* appendix to this note, C. CIV. V.N. art. 274 (control of children's property); art. 276 (control of property earned by child's labor).

[34] Family names such as "Nguyen" or "Ton" originally indicated geographical origins of a family. Today people socially embarrassed by their origins often give children different names to avoid stigma. Interview with Nguyen thi Xuan Huong, University of Denver graduate student, in Denver, Colorado, Sept. 1974.

[35] Interview with Suzanne Dosh, Assistant Director, Friends For All Children; Peg Peters and Sandra Schneider, Adoption Workers, Friends For All Children, in Boulder, Colorado, Sept. 1974.

[36] *See* notes 31, 32, 34, & 35 *supra*, and accompanying text.

the indiscriminate publication of notice required by a United States court, could provide an opportunity for an unscrupulous person to claim the child, thereby creating a legal limbo into which the child is propelled by requirements designed to provide certainty of status.

B. *Legal System*

Vietnamese law would attempt to preclude the opportunity for exploitation of the child or the adoptive family by recognizing and requiring consent of the family council in the absence of parents or grandparents with legal control, and by giving the head of the benevolent institution[37] rearing a child the power to relinquish custody and consent to its adoption. Courts assume custody and give consent for children abandoned in the streets and for recognized illegitimate children without known or identified parents.[38] Constructive notice or notice by advertisement is not required.

The rights of the natural relatives, including parents, grandparents, and family council, are of a much broader scope than in the United States where the grandparents' consent is only required in those states which refuse to accept relinquishment by a minor natural mother without her parents' consent also.[39]

Protection of the rights of the natural parents is accomplished by provision for authority through a stipulated sequence of relatives if the parents or others in the sequence are dead or "unable to express an opinion on the matter."[40]

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[37] *See* appendix to this note, C. CIV. V.N. arts. 249-52, 254. Charitable institutions are defined by Vietnamese law. Decree Law No. 027/66 art. 1 (1966) (legal transl. Truong Dac Phuong):

> All organizations operating in the territory of Viet Nam and set up either by an individual or a religious denomination, with a fraternal, non-profit seeking object, and having the capacity to receive at least 10 persons, for feeding them and assisting them, shall be considered as charitable organization[s] governed by the provisions hereof.

They are further defined, Order No. 620/BXH/ND art. 1 (1966) (legal transl. Truong Dac Phuong):

> Shall be considered as charitable institutions by article 1 of Decree Law No. 027/66 . . . the following organizations: orphanages, small children nursery, old people houses, beggar improvement houses, mute and deaf houses, children sponsorship center, vocational training centers, etc. and similar organizations, meeting all the conditions provided in article 1 hereabove and the activities of which are permanent.

[38] C. CIV. V.N. art. 250 in the appendix to this note.

[39] *E.g.*, MINN. STAT. ANN. § 259.24(2) (1972).

[40] *See* C. CIV. V.N. arts., 249, 250 in the appendix to this note.

Notice is automatic with the search through the progression of parties empowered to consent by the death or incapacity of others closer to the child. Allowance for separations due to the upheavals and disasters of war is apparent in the phrase "dead or unable to express an opinion," which occurs several times in the text of the law.[41]

Both Vietnamese laws and government statements of intent express strong motivation to provide for the orphaned and abandoned.[42] Due to the death, disappearance, and incapacity of so many, the paramount concern is to meet the needs of the homeless, and thereby mend the fabric of Vietnamese society.[43] Legal standards of Viet Nam are like the laws of the United States in that they reflect the cultural concerns, protect the rights, and attempt to meet the needs of the people they govern. Legislatures and courts must, however, realize that while the concerns of the two countries regarding children are the same, the means of implementation of the safeguards of all rights are different and the differences must be recognized in order that the best interest of the parties be served.

III. STATE STATUTES—THE PRESENT PERSPECTIVE OF THE COURT

At this time, there is no uniform United States policy with respect to recognition of the legal documents of the foreign-born, United States-adopted child. A United Nations agreement on the subject, ratified by both parties, or a United States-Vietnamese treaty supported by an act of Congress, would provide a standard for such uniform treatment.[44] Neither the United Nations Declaration on Human Rights nor the United Nations Declaration on the Rights of the Child make specific mention of the legal status of the orphaned or abandoned child.[45] To date no treaty between

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[41] *Id.* This is further evidenced by provision for passage of paternal power from father to mother in C. CIV. V.N. art. 267: "In case the father . . . cannot exercise such power due to his absence or any other reason whatsoever . . . ."

[42] *See* CONSTITUTION, REPUBLIC OF VIET NAM, art. 17, *supra* note 25. Further statements of this intent are: V.N. SOC. POL., *supra* note 17 at 6 (recognition of families, mothers and infants as underprivileged elements of society); *id.* at 17 (government resettlement of 197,378 refugees, 53 percent of whom were under 15 years of age); *id.* at 25 (Coming Home Program to reunite children with families where possible and encouragement of adoption).

[43] V.N. SOC. POL., *supra* notes 23-25 & 42.

[44] M. FORKOSCH, CONSTITUTIONAL LAW 156 (2d ed. 1969): "Under Art. VI a ratified treaty becomes the law of the land, even though it is not a legislative act but more nearly a 'contract' between two nations."

[45] *Supra* note 5.

the United States and Viet Nam with respect to adoption has been concluded; and there appears to be no treaty between any other country and the United States which would serve as precedent for uniform determination of the legal status of children based either on laws of their domicile, or on some other standard. During the period of numerous inter-country Korean adoptions of the 1950's and 1960's, there was apparently nothing concluded.[46]

Each state enacts laws to protect the rights and provide for the needs of citizens within its own jurisdiction. Most states make little or no provision in their adoption statutes for the completely different culture, legal system, customs, and economic environment from which the foreign-born, United States-adopted child comes.[47] Although some states may recognize foreign judicial decrees of termination of parental rights, this is helpful only in the instance that there is such a decree from the domicile.[48] In Vietnamese placements this is not a usual occurrence. The Uniform Adoption Act, which is incorporated in the statutes of many states, mentions foreign adoption, but does not uniformly provide for recognition of the law of the child's domicile with respect to relinquishment for adoption.[49] There is thus grave possibility of violence to the rights of the very parties whom the statutes by their intent would protect.[50]

A. *With Respect to Consent*[51]

1. Consent by Guardian

One purpose of statutory regulation of authority to consent

[46] Interview with John Adams, Director of Holt Children's Services in Eugene, Oregon, Sept. 6, 1974.

[47] *E.g.*, DEL. CODE ANN. tit. 13 § 927 (Cum. Supp. 1970); MICH. COMP. LAWS ANN. § 710.3(3)(a)(3) (1973); MONT. REV. CODES ANN. § 61-215 (1957); N.J. STAT. ANN. § 9:3-17 (Supp. 1960); N.M. STAT. ANN. § 22-2-35 (1973); ORE. REV. STAT. § 109.385 (1973); PA. STAT. ANN. tit. 5, § 509 (Supp. 1974); S.C. CODE ANN. § 71-207 (1962).

[48] *See, e.g.*, N.D. CENT. CODE § 14-15-17 (1971).

[49] *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 60.20 (1966); MONT. REV. CODE ANN. § 61-2-15 (Supp. 1971). Both statutes, typically, give the same effect to a foreign decree of adoption as to a decree issued within state jurisdiction. This is of little help to the foreign-born child not yet finally adopted in his own country when he is petitioning for a United States adoption.

[50] *See, e.g.*, jurisdictional statutory requirements, WIS. STAT. ANN. §§ 48.84 (persons required to consent).

[51] It must be clear that this discussion of statutory characteristics is illustrative of a variety of legal procedures. Any evaluation is made with respect to international adoption only. Exhaustive comparison of state law would serve no purpose, since jeopardy to the rights of the parties as discussed herein occurs in jurisdictions where courts have discretion

is protection of all parties to the adoption from coercion or other unscrupulous practices by an intermediary who also may be custodian of the child.[52] State statutes commonly provide for custody in a court or designee of the court when there is no living person in custody of the child.[53] However, establishment of custody and concomitant authority to give consent for adoption of a child without a guardian varies widely.[54]

In Hawaii, for instance, consent may be given by the court itself if the guardian is not legally empowered to give consent.[55] In Georgia, consent may be waived where parents are incapacitated or cannot be found and "the court is of the opinion that the adoption is for the best interest of the child. . . ."[56] Among the strictest provisions are those requiring judicial termination of parental rights or an order from a court giving consent powers to a guardian.[57] More moderate is the requirement that the person giving consent have authority to do so under the laws of the jurisdiction of the child's domicile.[58] Oklahoma, for example, recognizes consent of the person having legal custody who resides outside the United States.[59] A state not specifically recognizing a foreign legal document may very probably recognize the validity of a relinquishment of custody, a consent to adopt, or an adoption decree from elsewhere in the United States so long as it is in compliance with the laws of the state having jurisdiction.[60] Many states appoint an individual or an agency to act as next friend or

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in enforcing statutory requirements to promote the best interest of the child. Where that discretion is not specifically granted, legislative intent to act in the child's best interest would still allow something less than strict statutory construction. *See* note 11 *supra*.

[52] *E.g.*, MD. ANN. CODE art. 16, § 67(a) (1973); NEB. REV. STAT. §§ 43-708 (1974).

[53] *See* note 61 *infra*.

[54] *E.g.*, KY. REV. STAT. ANN. § 199.500 (1972); NEV. REV. STAT. §§ 127.040, 127.050, 127.053, 127.055, 127.057 (1973); S.D. COMPILED LAWS ANN. § 25-6-4 (1967); VT. STAT. ANN. tit. 15, § 432(a) (1974); VA. CODE ANN. § 63.1-225 (interim Supp. 1974).

[55] HAWAII REV. STAT. § 578-2(4) (Supp. 1974).

[56] GA. CODE ANN. § 74-403 (2) (1974) (exemption where child abandoned or parental custody terminated).

[57] *E.g.*, MD. ANN. CODE art. 16, § 72(a) (1973) (concerning court order establishing consent powers); WIS. STAT. ANN. §§ 48.84(1)(a), 48.871 (1957) (concerning judicial termination of parental rights).

[58] *E.g.*, MICH. COMP. LAWS ANN. § 710.44(4) (Supp. 1975):

> [T]he court . . . shall determine whether the consent was executed in accordance with the laws of that state or country . . . .

[59] OKLA. STAT. ANN. tit. 10, § 60.5(6) (Supp. 1974).

[60] *E.g.*, ME. REV. STAT. ANN. tit. 19, § 535 (1964); MO. ANN. STAT. § 453.170 (Vernon 1949).

representative of the child when no one fulfills the statutory requirements authorizing power of consent.[61] The appointment of a next friend indicates recognition of the fact that the child's best interests will truly be served when he is a separate party to the adoption with his own legal counsel.[62]

2. Consent by Intermediary Agency

In any international adoption the court and counsel must appreciate that whether or not the international agency which acts as intermediary holds legal custody and gives consent for the adoption, examination of its role is one of the most thorough protections for the rights of all the parties. Understanding of the foreign legal and cultural parameters within which the intermediary functions will facilitate reasonable application of state statutory requirements for both consent to adopt and notice.

The local Vietnamese orphanage which consents to adoption by a United States family might appear to be the counterpart of an American placement agency. Rather, it is the international agency which acts as intermediary and brings the available child and prospective parents together. The Vietnamese orphanage stands in the place of the natural parent for an orphaned or abandoned child. An agency which is licensed in Viet Nam may or may not have authority to consent,[63] but does parallel the placement agency in a domestic United States adoption.

Strict Vietnamese control of intermediary practices is achieved by means of individual contracts by which foreign agencies are licensed to operate in Viet Nam, rather than by statutes controlling operation of charitable institutions.[64] Each contract is by government decree.[65] Due to varied forms of guardianship per-

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[61] *E.g.*, W. VA. CODE ANN. § 48-4-1 (Supp. 1974):

> [I]f there be no legal guardian nor any person having the legal custody of the child, then such consent must be obtained from some discreet and suitable person appointed by the court or judge thereof to act as the next friend of such child . . . .

[62] Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65, *cert. denied*, 404 U.S. 805 (1971); J. GOLDSTEIN, A. FREUD & A.J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 65 (1973); Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1 (1972).

[63] This authority is by individual contract, note 65 *infra*.

[64] As charitable institutions, Vietnamese orphanages and international agencies are strictly controlled and subject to inspection at all times. They are accountable for their finances and charges. See note 37 *supra* for definition of a charitable institution.

[65] The usual contract begins with an order number identifying the institution which

mitted by these individual contracts, foreign agencies may place children with releases directly from the local orphanage to a family in the United States.[66] Awareness of this governmental control of all foreign adoptions and of the scope of authority of a governmentally-limited number of agencies is significant to the judicial consideration of the role of the intermediary in Vietnamese placements. Verification of authority to give consent may or may not give an indication of the intermediary's activities, but the terms of its Vietnamese contract will.[67]

Examination of the authority of the benevolent society, *i.e.* charitable institution, to relinquish the child without consideration of the credentials and the role of the international agency which actually made the placement will not provide the protection for the parties which United States laws intend.[68]

B. *With Respect to Notice*

In the United States, statutory provision for notice to the natural parents of an adoption hearing is a component of the

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has been decreed a charitable institution by the Ministry of Social Welfare. Usual terms of such a contract would include agreements to absolutely respect Vietnamese adoption laws; agreement to place children only with families having approved social work home studies with certified approvals; agreement to provide nourishment for children, to assist local orphanages, and to provide emergency medical care; and agreement to hold guardianship of children only as specified by contract.

[66] The scope of authority permitted by contract is discussed in note 65 *supra*. An international agency may not have spent the months required by the added paperwork step of documenting its legal custody on a per child basis when that custody is already decreed by contract.

[67] Note 65 *supra*.

[68] The term "benevolent society" (C. Civ. V. N. arts. 250, 253 in appendix to this note) comes from the Vietnamese "hoi phuoc thien." Vietnamese law is modeled after the French Civil Code and French is the second language in Viet Nam. Translated from this French-Vietnamese background, the English choice of words would be "benevolent society." This is so because the French adjective "benevole" means without charge, while the French adjective "charitable" only refers to the Biblical virtue of love for one's neighbor. The operation of the groups defined in note 37 *supra* is more accurately "benevole." "Societe," in French, refers to an organized group of people working together while the French noun "institution" denotes the commencement of something, or a social institution such as marriage. Without French influence the Vietnamese to English translation of "hoi phuoc thien" is more accurately "charitable institution." Decree Law No. 027/66 Order No. 620 BXH/ND, which refer to charitable institutions, and C. Civ. V.N. arts. 250, 253, which refer to benevolent societies, were translated by two different persons. From their context it is apparent that both refer to the groups sheltering and having custody of orphaned, abandoned children. Petite Larousse Dictionnaire Encyclopedique 115, 191, 555, 974 (1959); interview with Nguyen thi Xuan Huong, University of Denver graduate student, in Denver, Colorado, Sept. 1974; notes 19 and 37 *supra*; C. Civ. V.N., appendix to this note.

constitutional right of due process.[69] Notice may or may not be required to parents whose consent is not required because their parental rights are terminated.[70] Louisiana appoints a curator ad hoc, who may accept service of notice where the parent "cannot be located or is not domiciled within the state."[71] Even when both parents are dead, Rhode Island requires that notice be published in such newspaper as the court directs.[72]

Concerns for the non-custodial divorced parent,[73] the natural mother,[74] and the security of the child and his adoptive family after issuance of the final decree[75] are all well founded in view of the rising divorce rate, and the vulnerability of the parties to extortionate or black market adoption practices.

The only provision for notice in Vietnamese adoption law is that in the event of divorce, the parent in custody "should notify the other spouse" of the adoption.[76] Passage of the power of consent from parents through paternal grandparents, maternal grandparents, and family council to court or benevolent society, protects ties to biological relatives and provides for notice in a manner more cognizant of local realities in Viet Nam than would a United States court-ordered summons.[77]

Because only persons within the jurisdiction of the United States are entitled to constitutional due process,[78] a court may be

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[69] U.S. CONST. amend. V, XIV.

[70] *Compare* N.C. GEN. STAT. § 48-5 (Supp. 1974) which does not require presence or consent of an abandoning parent or guardian *with* ARK. STAT. ANN. § 56-104 (1971) which requires notice to "all whom it may concern."

[71] LA. REV. STAT. ANN. § 9:426 (1965).

[72] R.I. GEN. LAWS ANN. § 15-7-8 (1969).

[73] *E.g.*, *In re* Adoption of Bascom, 126 Mont. 614, 246 P.2d 223 (1952).

[74] Statutes specifying a period of time which must elapse before relinquishment is valid are common. *E.g.*, ARIZ. REV. STAT. ANN. § 8-107 (Supp. 1973); ILL. REV. STAT. ch. 4, § 9.1-8 (Supp. 1974). U.S. CONST., note 69 *supra*, also establishes the right of the natural parent to notice as a party to the adoption of a child.

[75] Letter from Daniel J. Evans, Governor of the State of Washington, to the Washington State Senate, March 20, 1973, accompanying Senate Bill No. 2459, ch. 134 (1973):

> Failure to give such notice can mean that adoptive parents may lose their child at some point in the future if the parent who was not notified attacks the adoption in court. The processes and procedures provided for in this act are designed to render as secure as possible any adoption which is finalized in a legal manner.

[76] C. CIV. V.N. art. 249 in appendix to this note.

[77] Interview with Nguyen thi Xuan Huong, University of Denver graduate student, in Denver, Colorado, Sept. 1974. *See* text accompanying note 29 *supra*.

[78] Wong Wing v. United States, 163 U.S. 228, 242 (1896) (concurring opinion):

acting improperly by extending such protection to those still in Viet Nam. Strict construction and application of local statutory requirements for authority to consent or service of notice would be in part an incorrect presumption that the same constitutional rights and the same social circumstances exist in the forum from which the child immigrates.[79]

IV. Added Perspective for the Court

A court aware of differences between United States and Vietnamese adoption procedures, the influence of Vietnamese law and culture on the parties to the adoption, and the possible narrowness or inapplicability of local statutes will be best able to rule in the best interest of the child, to protect the rights of the parties, and to assure the finality and security of its final decree. The following suggestions may aid the court in meeting its responsibilities.

A. *Comity*

Use of the principle of comity would permit recognition of an individual's status under foreign law, so long as it is not offensive to the morals or public policy of the local forum.[80] In a parallel circumstance, polygamous foreign marriage has been recognized by comity so that the parties to that institution are not deprived of the incidents and benefits of their status.[81] In discussion of comity, Goodrich notes "[R]easonable expectations of the family members arising out of their relationship based on their personal law could be given the maximum effect possible under

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> The term "person," used in the fifth amendment, is broad enough to include any and every human being *within the jurisdiction of the republic*.

Id. (emphasis added).

[79] There is no express mention of due process of law in the Vietnamese Constitution.

[80] > To constitute a conflict with the public policy of the state justifying rejection of the foreign law or right, the latter must be contra to good morals or natural justice or prejudicial to the state or its citizens.

15A C.J.S. Conflict of Laws § 4(4)b (1967).

> Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified, in the judgment of the Supreme Court, by a strict rule of parity.

CONSTITUTION OF THE UNITED STATES OF AMERICA, ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE, 1964 (N. Small ed. 1964, U.S. Govt. Printing Off.) at 775.

[81] *In re* Dalip Singh Bir's Estate, 83 Cal. App. 2d 256, 188 P.2d 499 (1948). Two widowed spouses were granted a share in the estate of the deceased.

forum law."[82] Acceptance of the legal status of the child relinquished for adoption established under Vietnamese law would allow him the benefit of an adoptive family.[83] Denial of that benefit, or unnecessary peril to it, is hardly in keeping with the morals, public policy, or intent of the United States adoption laws to serve the best interest of the child.[84] In *Doulgeris v. Bambacus*,[85] Virginia courts refused to recognize a Greek adoption finalized in Greece without consent of the natural mother. Homer Clark found this denial to the adopted child a failure to afford her the protection of her best interests which was at the heart of Virginia legal policy.[86] He also noted other United States acceptances of Greek adoptions.[87]

Legislative intent to protect the best interest of the child and acceptance of Vietnamese legal standards through comity would permit reasonable, though not always statutorily strict, verification of the child's legal status.

B. *Legislative Reform*

Growing interest in foreign placements is and has been a trend since Korean adoptions began in significant numbers.[88] Increased numbers of Vietnamese adoptions appearing for finalization before United States courts attest to this.[89] There are no indications that the situation will change. Birth control and legalized abortion may continue the scarcity of adoptable children and a corresponding surplus of potential adoptive parents in the United States for some time. Legislation which makes provision for this trend is needed. Enactment of state statutes dealing spe-

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[82] H. GOODRICH & E. SCOLES, CONFLICT LAWS 243 (1964).

[83] C. CIV. V.N. arts. 248, 253 at appendix to this note.

[84] *See* notes 11 and 80 *supra*.

[85] 203 Va. 670, 127 S.E.2d 145 (1962). In this case, strict construction of state statute denied the best interest of the child, which interest Virginia law by its intent would protect.

[86] H. CLARK, JR., LAW OF DOMESTIC RELATIONS 665 (1968). In *Doulgeris v. Bambacus*, 203 Va. 670, 127 S.E.2d 145 (1962), the child's adoption for convenience of an aging couple was an accomplished fact. Denial of recognition of her status, because her legal Greek adoption was without her natural mother's consent, was of no benefit to the child or to the natural mother. It also deprived her of an inheritance which would have been in her best interest after years of service and companionship to the adoptive parents.

[87] H. CLARK, *supra* note 86.

[88] The late Mr. Harry Holt began the Holt Adoption Program in 1956. Since that time, Holt has found homes for over 12,000 children. Holt Children's Services of Viet Nam, Inter Country Adoption Program Informational Pamphlet.

[89] *Supra* note 15.

cifically with foreign adoptions would be a progressive step. The typical recognition by states of final foreign adoption decrees is useless to the child not adopted in his native country.[90] Wisconsin has recently modified its laws to allow for the circumstances of such children.[91]

There are provisions which facilitate the process of formalizing the adoption of a foreign-born child in some state statutes.

> [T]he court having jurisdiction of adoptions in the country, upon evidence presented by the commissioner of public welfare from information secured at the port of entry, or upon evidence from other reliable sources, may make findings of fact as to the date and place of birth and parentage of such person.[92]

> Where a consent or a surrender is signed in a foreign country, the execution of such consent shall be acknowledged or affirmed in a manner conformable to the law and procedure of such country.[93]

> [I]n the case of any child from outside of the United States, its territories or the commonwealth of Puerto Rico placed for adoption by the welfare commissioner or by any child-placing agency, the petitioner has filed an affidavit that such child has no living parents or that such child is free for adoption and that the rights of all parties in connection with such child have been properly terminated under the laws of the jurisdiction in which the child was domiciled prior to being removed to the state of Connecticut . . . .[94]

Such separate provisions allow for foreign legal and cultural differences without disruption of the intended function of local statutes in domestic adoption. With a minimum amount of legislative enactment, the best interests of all children, foreign and United States born, have been protected in states with these statutory provisions.

C. *Judicial Awareness*

Most effective in the final analysis will be a realistic appraisal by the court of all factors, including the legal and cultural circumstances of the Vietnamese or any foreign-born child. The legal documents of the child should be viewed in the context of

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[90] *See* notes 47 and 49 *supra*.

[91] WIS. STAT. ANN. § 48.97 (1974); Public Act No. 74-164 § 7(d)(1) (1974) Conn. Legisl., *repealing* CONN. GEN. STAT. ANN. § 45-44 (1958).

[92] MINN. STAT. ANN. § 144.176(2) (1970).

[93] ILL. REV. STAT. ch. 4, § 9.1-10K (1966).

[94] Public Act No. 74-164 § 7(d)(1) (1974) Conn. Legisl., *repealing* CONN. GEN. STAT. ANN. § 45-44 (1958).

the needs and realities faced by citizens of Viet Nam or another foreign state. Effective safeguards remain for the scrutiny of the court: the licenses and qualifications of the intermediary agencies and institutions concerned, enforcement of thoroughness in adoptive family studies, and state department of welfare approvals of those studies.[95] One authority has urged that the court seek

> [a]ssurance that a thorough investigation of all relevant facts has been made by some competent and reliable person or welfare agency, so that the court can know that the adoption is likely to be successful. That is more important than anyone's domicile, more important then any mechanical or legal connection between any person and any state. Insistence upon connection with a particular state is artificial and irrelevant to the true problem.[96]

CONCLUSION

The legal concept of adoption has evolved from provision for a legal heir to present concern for the best interest of the child.[97] The unique manner in which foreign adoption, as discussed herein, has developed indicates that the concept of adoption may be evolving further still toward a time when the focal point of the concept will be the right of any child anywhere, regardless of geographical or legal boundaries, to accommodation of national laws and a mutuality of understanding between them which will permit that child to attain "affection, care and protection . . . and a legal relationship that includes the same rights and responsibilities that exist between natural parents and their children."[98]

The development of foreign adoption is unique because the leadership in establishing procedures for meeting the legal requirements of a foreign nation, the United States Immigration and Naturalization Service, and the state, came not from formal adoption agencies but from individual United States citizens.[99] The courage and resourcefulness of such individuals began the phenomenon now recognized as international or foreign adoption. In order to unite children with families needing and wanting

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[95] 8 U.S.C. § 204.2 (1970).

[96] LEFLAR, AMERICAN CONFLICTS LAW 579 (1959).

[97] Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922); Huard, *Law of Adoption: Ancient and Modern*, 9 HARV. L. REV. 743 (1956).

[98] *See* note 1 *supra* and accompanying text.

[99] Two pioneers in the field of international adoption are Mr. Harry Holt and Mrs. Wende Grant. See note 88 concerning Mr. Harry Holt. In 1965, Wende Grant, Director of Friends For All Children, and Duane Grant were among the first United States citizens to complete a Vietnamese adoption by proxy.

them, and to responsibly share this expertise, international adoption agencies have been founded.[100]

Similar initiative and resourcefulness is required of present adoptive parents who must prepare extensive legal documents and make considerable financial and emotional investment, based only upon the hope that a child may be placed with them. Such determination is not born of objective awareness. Those aware of the truly overwhelming nature of international "red tape" and those aware of the potential legal pitfalls are among the first to become discouraged and withdraw. Therefore these parents and the best interests of their adoptive children are especially needful of a United States legal system as cognizant of their needs as it is of the needs of parties to domestic adoptions.

The current movement toward refinement of adoption procedure is a viable solution to the scarcity of children available for adoption in the United States, and to the desperate needs of children in other parts of the world. It is, however, a phase which will require added perspective on the part of the courts and legislators if our legal system is to protect the rights and meet the needs of this unique and growing segment of the United States citizenry as adequately as it has met other needs and novel circumstances in the past.

Doris M. Besikof

[100] Friends For All Children, 445 So. 68th Street, Boulder, Colorado; Holt Children's Services, P.O. Box 2420, Eugene, Oregon.

APPENDIX

CIVIL CODE OF THE REPUBLIC OF VIET-NAM, promulgated by Decree-Law No. 028-TT/LSU dated December 20, 1972. Articles 247-54, 263-64, 274, 276 concerning adoption, child welfare *etc.*

TITLE VII—ADOPTION

CHAPTER I: REQUIREMENTS FOR ADOPTION

Article 247. An adoption should be based on legitimate reasons and be beneficial to the adopted child.

A person may adopt several children, but a child cannot be adopted by several persons, except by two spouses.

Article 248. Only a man or woman over 35 years of age shall be authorized to adopt a child and [he or she] should be 20 years older than the adopted child unless exemption is granted by the Chief of State.

A married man or woman can only adopt a child jointly with the spouse or with the consent of the latter.

Unless exemption is accorded by the Chief of State, both spouses who adopt a child should have been married for at least 10 years and have remained childless, and one of the spouses should fulfill the requirements stipulated in paragraph 1 of this article.

When one of the spouses cannot express his opinion concerning the matter, the other may adopt the child for his own, but should fulfill all other requirements stated above.

Vietnamese citizens may adopt and be adopted by foreigners.

Article 249. If the adopted child is a minor and his own parents are still alive, both parents must consent to the adoption.

If the father or the mother is dead or unable to express an opinion on the matter, the consent of either one of them is sufficient.

If the parents are separated or divorced, the consent of the father or the mother, whichever has custody of the child, is sufficient to the completion of the adoption, but he or she should notify the other spouse. The latter has the right to object to the adoption within a period of 1 month with a notarized act to the spouse who consented and to the person who wants to adopt the child.

Article 250. If both parents of a minor are dead, or if both are unable to express [an opinion] on the matter, the consent shall be given by either the paternal grandfather or paternal grandmother. If they are not available, the consent shall be given by either the maternal grandfather or maternal grandmother.

If no grandparents are alive, the consent shall be given by the family council.

If it is an abandoned child or an illegitimate child who has been recognized but whose parents are dead or unable to express [an opinion] on the matter, the consent shall be given by the court in lieu of the family council.

With regard to children being reared by a benevolent society, such society shall give consent to the adoption.

Article 251. The consent of the child is also necessary if he is 16 years of age.

CHAPTER II: PROCEDURES FOR ADOPTION

Article 252. The adoption of the child is made by a contract of adoption concluded in the presence of: a notary of office of justice of the peace at the place of residence of the adoptive parent or the adopted child, the adoptive parent, the child if 16 years old, and any person whose consent is necessary to the adoption.

If these persons live abroad, they can submit their consent to Vietnamese diplomatic or consular personnel.

Article 253. The contract of adoption shall record the consent of the parents or the grandparents, or the family council, or of the benevolent society, along with the consent of the adopted child if 16 years old.

Article 254. The contract of adoption shall be approved by the court of first instance at the place where the contract was made, upon request of either party concerned.

In the case mentioned in Article 249, paragraph 3, the court will hear the pleading of both parents before having a public hearing for the case. The brief of the case shall be submitted to the public prosecutor. The court shall, in a public hearing, approve or reject the adoption after having considered:

(1) whether the fulfillment of the legal conditions have been fulfilled;

(2) whether the motivation for the adoption is legitimate and whether the adoption is beneficial to the child.

CHAPTER III: EFFECTS OF ADOPTION

Article 263. The adoption may be abrogated by order of the court upon request of the adoptive parent or the adopted child, or relatives [of the child] when he is a minor, only for very important reasons.

The court shall decide after hearing the pleading of the public prosecutor.

The declaratory part of the judgment shall be transcribed and recorded in the margin of the birth certificate of the adopted child as stated in Article 256.

The judgment shall also determine the guardianship of the child, if he is a minor.

Article 264. The judgment abrogating the adoption shall terminate all future consequence of the adoption.

TITLE VIII—PATERNAL POWER

Article 274. During marriage, the father shall enjoy the property of the juvenile child until the child is 18 or has become emancipated [from the parental power]. If the father dies, such enjoyment shall be assumed by the mother.

In case the parents are divorced or separated, such enjoyment shall belong to the party the court deems not at fault in the divorce or separation.

Article 276. Property acquired by the child from his own labor or from an inheritance which specifies that the parents shall not take any part therein, shall be separated from that enjoyed by the parents.

Prepared by Phuong Khanh Nguyen, Legal Processing Assistant, Far Eastern Law Division, Law Library, Library of Congress, Aug. 1974.

DECREE LAW No. 027/166 of July 15, 1966, laying down modalities for the operation of charitable institutions in Viet Nam (selected articles therefrom).

CHAPTER I

CHARITABLE INSTITUTIONS DEFINITION AND PROCEDURE FOR SETTING UP

. . . .

ARTICLE 2. Charitable institutions can operate only after having obtained a license issued by the Minister of Social Affairs, after they have filed a declaration in due form to the Prefecture of Saigon, the Mayor's Office or the Provincial Administrative Headquarters in the provinces depending on the location of the said charitable institution. The procedure for the filing of the said declaration is outlined in the following articles.

ARTICLE 3. Charitable institutions having been set up exactly as per the provisions outlined herein, shall be granted the juridical personality. Charitable institutions having been confirmed as being of public utility shall have in addition the capability to receive donations made by living persons or by persons after their death . . . .

ARTICLE 4. In the declaration in respect of the setting up of the charitable institution, the following information shall have to be given:

—Name of the agency
—Its objects and policies
—Office

—Relief capability, and operating facilities of the agency
—Full name, citizenship and address of the Director of the agency.

. . . .

. . . .

ARTICLE 7. Any change in the location of the office, name and By-laws of the agency shall have to be reported to the administrative authorities of the locality eight (8) days prior to carrying out same.

ARTICLE 8. Those having been convicted of a felony or a misdemeanor and who have been sentenced to imprisonment, except sentenced due to inattention or negligence, and not the offense of fleeing after having caused a traffic accident, shall not be qualified for holding the position of Director, training member or supervising member of a charitable institution.

If during their term of duty, any of these staff members fall within the above cases of disqualification, they shall have to resign and the agency shall have to find forthwith a replacement.

. . . .

ARTICLE 10. Whenever a director is replaced, the agency shall have to report the fact to the administrative authorities of the locality. To the report shall be attached the . . . judiciary record of punishments not more than three months old of the replacement.

The Prefect, Mayor or province chief of the locality shall give his comments, and shall convey the said report to the Minister of Social Affairs who will examine it and decide it. In case the Ministry of Social Affairs does not approve it, the agency shall have to propose another replacement.

ARTICLE 11. Any change in the training and supervising staff shall also have to be reported to the administrative authorities of the locality eight days prior to the carrying out of same.

To the said report shall be attached an extract from the judiciary record of punishments not more than three months old of the replacement.

CHAPTER II

CONDITIONS FOR OPERATION

ARTICLE 12. Charitable institutions shall have to comply with laws and regulations on public sanitation.

ARTICLE 13. Whenever it is found that the life or health of the relieved persons is jeopardized due to the narrowness of the installation, or due to the constructions being unfirm, or due to the negligence in the care and feeding of the above persons, or because there is an abuse or rough treatment against them, the director shall have to fix up constructions which have to be rehabilitated or shall have to straighten up the way of operating the agency by taking appropriate action.

In case of emergency, the Prefect, Mayor or Province Chief may order the temporary closing of the agency until the maintenance of the installation is completed, or changes in the training and relief are made.

ARTICLE 14. Each agency shall have to keep a register numbered and initialled by the Prefect, Mayor or Province Chief on the first page and last page thereof. The following information shall have to be given in full:

a. With respect to orphans of less than 18 years of age: Full name, age, sex, birthplace, parents' name, address (if any), and the ones of persons having entrusted them to the agency.

Besides, as regards unrecognized persons and that the above information cannot be written, the following should be specified: estimated age, sex, special physical features upon their admittance, date and time of admittance, and sent to the agency by which individual or agency.

Three (3) days after having admitted children not having been recognized by anyone, the agency shall have to report to the local administrative authorities for making out their civil status.

. . . .

ARTICLE 17. The agency shall be compelled to keep account books, it shall have to record cash receipts and cash disbursements in a clear manner, as well as donated items and sums of money, and how the income and properties donated during the lifetime and after the death of persons are managed and utilized. The agency shall also have to keep adequately all documents for supporting each disbursement having been made as well as all cash receipts referred to in the above paragraph.

ARTICLE 18. If the group or private person who/which is running the agency wants to stop the operations of the said agency on his/its own initiative, he/it shall have to give a prior notice of at least one (1) month to the Prefect, Mayor or Province Chief together with a report on the financial position closed as of the date of stoppage of operation, and an inventory of properties (personal properties and real properties) for enabling the authorities to solve on time various problems on the number of relieved persons, on the finance and properties of the agency, if any.

CHAPTER III

CHECKING AND SANCTIONS

ARTICLE 19. All charitable institutions are placed under the permanent control of a local control committee . . . .

. . . .

ARTICLE 21. In addition to the penalties provided for criminal offenses, the director and staff of charitable institutions may also receive warnings, or they may be proposed for being replaced, and the charitable institution may be closed temporarily or definitively by a decision of the Minister of Social Affairs based on the report and recommendations of the members of the Control Committee referred to in Articles 19 and 20 hereabove.

ARTICLE 22. Private persons or persons managing an association or convents who/which, on his/their own initiative, give permission to the operation of a charitable institution without a license as referred to in article 2 hereabove, or who/which do not comply with the order closing the agency temporarily or definitively shall be liable to a fine of from VN$1,000 to VN$10,000 and to imprisonment ranging from one to 5 days, or to one of these two penalties.

In case of a second offense, the bodily sanction shall have to be enforced, and the amount of the fine shall be doubled.

. . . .

ARTICLE 23. Any director or staff of a charitable institution having not been ratified, but who still take part in the operations of the agency in such a capacity shall be liable to a fine ranging from VN$1,000 to VN$10,000.

In case of second offense, the penalty shall be doubled and the offender may also be jailed during one day up to 5 days. In addition, the agency may be closed.

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Translated by: Truong Dac Phung, legal translator.

NOTE

FEDERAL TAXATION OF DIVORCE PROPERTY SETTLEMENTS AND THE AMIABLE FICTIONS OF STATE LAW

A property settlement[1] pursuant to a divorce or dissolution of marriage may have substantial federal income tax consequences[2] for husbands in common law property jurisdictions.[3] Since *United States v. Davis*[4] the transfer of appreciated property from a husband to his wife at the end of their marriage has constituted a taxable event for the husband.[5] Although the *Davis* decision has been criticized,[6] it is still the law of the land.[7] A recent

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[1] It is immaterial whether the "settlement" is the product of an agreement between the spouses or an apportionment of property made solely by the court. The federal income tax consequences in either case would be identical. Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964).

[2] In two such recent cases the total amount of taxes in controversy exceeded $200,000. Wiles v. Commissioner, 499 F.2d 255, 257 (10th Cir. 1974); Imel v. United States, 375 F. Supp. 1102, 1103 (D. Colo. 1974).

[3] *See* Hjorth, *Community Property Marital Settlements: The Problem and a Proposal*, 50 WASH. L. REV. 231 (1975), for a recent discussion of the tax consequences of divorce property settlements in community property jurisdictions. A discussion of the income tax consequences of divorce in general is beyond the scope of this note. *See* Graves, *Federal Taxation in Separation and Divorce*, 29 WASH. & LEE L. REV. 1 (1972); Gunn, *The Federal Income Tax Effects of the Missouri Version of the Uniform Divorce Act*, 1974 WASH. U.L.Q. 227.

[4] 370 U.S. 65 (1962), *rev'g* 287 F.2d 168 (Ct. Cl. 1961).

[5] *See* note 12 *infra*.

[6] *See* Schwartz, *Divorce and Taxes: New Aspects of the* Davis *Denouement*, 15 U.C.L.A.L. REV 176 (1967); Note, *Property Transfer Pursuant to Divorce—Taxable Event?* 17 STAN. L. REV. 478 (1965); Note, *Capital Gains Taxation on the "Transfer" of Appreciated Property From Husband to Wife Pursuant to a Divorce Settlement*, 38 IND. L.J. 494 (1963).

[7] The *Davis* rule has generally been expanded by the lower courts. *See, e.g.*, Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964). The most recent Revenue Ruling on the subject is based on *Davis*. Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6.

[8] The opinion of the Colorado Supreme Court is *In re* Questions submitted by United States Dist. Ct., 517 P.2d 1331 (Colo. 1974), hereinafter referred to as *Imel*. The Colorado Supreme Court rendered that opinion in response to a question concerning Colorado law submitted by the United States District Court for the District of Colorado which arose out of the case it was considering, Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1974). The question was:

> Under Colorado law, is such a transfer [by a husband pursuant to a divorce property settlement] a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners [and therefore not taxable to the husband], or does the transfer more closely resemble a conveyance by the husband for the release of an independent obligation owed by him to the wife [and therefore taxable under *Davis*]?

Colorado case, *Imel v. United States*,[8] and Oklahoma cases[9] upon which *Imel* relies have attempted, through interpretations of state law, to avoid the *Davis* rule and thereby benefit resident taxpayers. This note will discuss the merits of these attempts to sidestep *Davis*.

I. DAVIS V. UNITED STATES

In *Davis* a Delaware husband transferred appreciated stock to his wife pursuant to a divorce settlement "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever,"[10] including her rights under Delaware law to dower, intestate succession, and to share in a portion of her husband's property upon divorce. The husband argued that under Delaware law his wife's above-mentioned marital rights were such that she was, in effect, a co-owner of his property, so that as a result of the property settlement there was a nontaxable division of property between him and his wife as co-owners, rather than a taxable transfer to his wife of appreciated property owned solely by him. The government argued that a Delaware wife's marital rights did not give her an interest in her husband's property, but merely imposed upon him certain personal obligations.

On review the Supreme Court held that while a Delaware wife might have some interest in the property of her husband, the interest was an inchoate one which did not remotely reach the dignity of co-ownership. In support of its opinion the Court cited her inability to manage or dispose of her husband's property, the lack of descendability of her interest, the requirement that she survive him to share in his intestate estate, and the fact that her share of his property upon divorce depended upon the discretion of the court. Therefore, the Court concluded that

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375 F. Supp. at 1116. The Colorado Supreme Court answered that the transfer more resembled a division between co-owners. 517 P.2d at 1334. On that basis, the district court held that the husband was therefore not taxable for his transfer of appreciated property to his wife. 375 F. Supp. at 1118.

The procedure of certification to the Colorado Supreme Court, in itself, is not open to serious dispute. *Lehman Bros.* v. *Schein*, 94 S. Ct. 1741 (1974). For a criticism of this procedure, see Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 MIAMI L. REV. 717 (1969).

[9] The Oklahoma cases followed by the Colorado Supreme Court are discussed in text accompanying notes 80-106 *infra*.

[10] Language from the agreement quoted in 370 U.S. at 67.

> [r]egardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof. . . . [T]he rights of succession and reasonable share [at divorce] do not differ significantly from the husband's obligations of support and alimony. They all partake more of a personal liability of the husband than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband's property . . . but certainly this happenstance does not equate the transaction with a division of property by co-owners.[11]

Consequently, the husband realized a taxable gain upon this disposition of appreciated property.[12]

Davis, then, requires that state law be examined to determine the property rights of spouses[13] within the state. The state-created property right must then be measured against the "federal criteria"[14]—the wife's power to dispose of or manage her interest, the descendability of the interest, whether she must survive her husband to receive it, and whether the size of the interest is within the discretion of the court—to determine if the wife's interest reaches the dignity of co-ownership so that the transaction is a nontaxable one.

On the basis of the *Davis* test, property settlements in community property jurisdictions, where a wife is a co-owner are

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[11] *Id.* at 70.

[12] The Court reasoned that by its inclusive definition of income, *i.e.*, "all income from whatever source derived, including . . . [g]ains derived from dealings in property . . . ." [INT. REV. CODE OF 1954, 61(a)(3)], Congress intended the economic growth of the stock transferred here to be taxed. The gain to be taxed is the "excess of the amount realized therefrom over the adjusted basis" of the stock. INT. REV. CODE OF 1954, § 1001(a). The "amount realized" is "the sum of any money received plus the fair market value of the property (other than money) received." INT. REV. CODE OF 1954, § 1001(b). In divorce property settlements the "property . . . received" is the release of the wife's marital rights. The Court ruled that the fair market value of the rights released by the wife could be determined—in an arm's length transaction such as this, the wife's marital rights may be presumed to be equal to the fair market value of the property given her by the husband. 370 U.S. at 72, 73, *rev'g* 287 F.2d 168 (Ct. Cl. 1961) which had held, following Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960), that it was impossible to presume that the wife's rights were equal in value to the property transferred by the husband for their release.

[13] Nowhere in *Davis* is this requirement expressly stated. That state law be consulted is implicit throughout the Court's lengthy discussion of Delaware law. Moreover, *Davis* has also been construed as requiring a determination of state law with respect to the property rights of a wife. *See, e.g.*, Wiles v. Commissioner, 499 F.2d 255, 257 (10th Cir. 1974).

[14] Wallace v. United States, 309 F. Supp. 748, 760 (S.D. Iowa 1970), *aff'd*, 439 F.2d 757 (8th Cir. 1971).

generally nontaxable.[15] The same is apparently true in common law property states where there is an equal division of property which is jointly acquired, either by gift or by commingling of earnings in the acquisition of property.[16] However, in common law jurisdictions a transfer by a husband to a spouse who has not commingled her earnings[17] with his in jointly acquiring property would normally be taxed under the *Davis* rationale. The exception to this rule has been created by *Imel* and related cases. An understanding of the marital relation and marital property rights, both past and present, is helpful in considering *Imel*.

II. THE COMMON LAW MARITAL RELATIONSHIP

A. *Early Common Law*

The concept that marriage suspended the legal existence of a wife and merged it with that of her husband had its roots in English common law.[18] Because of this merger, marriage had severe effects upon a wife's property rights.[19] Her tangible personalty acquired before or during the marriage became her husband's;[20] her husband became entitled to the use, enjoyment, rents, and profits of her realty until birth of issue;[21] after birth of issue he acquired a life estate in her realty as tenant by the curtesy[22] which, unlike tenancy by the marital right, survived her

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[15] At least when there is an equal division of community property. Frances R. Walz, 32 B.T.A. 718 (1935). Of course, the situation may be more complex, as when an unequal division of community property is made. *See* Hjorth, *supra* note 3, at 252.

[16] Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6. The ruling is discussed by Hjorth, *supra* note 3, at 253.

[17] *See, e.g.*, Hayutin v. Commissioner, 508 F.2d 462 (10th Cir. 1975) where the wife contributed her earnings for a few of their first years of marriage, stopped working, and then made no more contributions to acquire any of the property which was the subject of the property settlement. That case did not consider Rev. Rul. 74-347, but it does illustrate one of many situations in which the Ruling would fail to give favorable tax treatment to a husband in a common law property jurisdiction.

[18] This was not the case in many other cultures, *e.g.*, Egyptian and certain American Indian societies. Crozier, *Marital Support*, 15 BOSTON U.L. REV. 28, 29 (1935). Nor was it true in early Saxon, Scottish, Welsh, or Civil law. Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1044 (1972).

[19] *See* W. TIFFANY, PERSONS AND DOMESTIC RELATIONS 124 (3d ed. R. Cooley 1921), and Johnston, *supra* note 18, at 1045-46.

[20] 1 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN §§ 206-38 (1873).

[21] This tenancy "by the marital right," or *jure, uxoris*, attached to realty of the wife acquired before or during the marriage. 1 AMERICAN LAW OF PROPERTY § 5.50 (A.J. Casner ed. 1952).

[22] *Id.* at § 5.57.

death. Moreover, the husband owned his wife's earnings,[23] and she could not contract, sue, or be sued on her own behalf.[24]

While marriage gave a husband a substantial interest in the property of his wife, the reverse was not true. His wife acquired no vested interest in his property until his death, at which time she was entitled to dower and/or[25] an intestate share of her husband's personalty.[26]

And for all her proprietary sacrifices, what did a wife receive from her husband at common law? Besides dower and intestate succession,[27] a wife was entitled to be supported by her husband. The total marital relationship—with a wife losing her property and the right to her own labor but acquiring her husband's legal obligation of support—has been unattractively, but perhaps accurately described some 40 years ago as follows:

> Such a situation can be explained on the theory that one of the parties has an original right to the other's labor [and property] without having to pay for it; although in no other department of life has anyone had such an ownership . . . since the abolition of slavery. Clearly, however, that economic relationship . . . is the economic relationship between an owner and his property rather than that between two free persons. . . . The financial plan of marriage law was founded upon the economic relationship of owner [the husband] and property [the wife].[28]

B. *Modern Marital Rights in Colorado*

In the last 100 years there has been considerable change in the rights and status of married women in Colorado. Property of all types acquired by a woman prior to her marriage, including

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[23] W. TIFFANY, *supra* note 19, at § 48.

[24] J. BISHOP, *supra* note 20, at §§ 39, 44.

[25] 1 AMERICAN LAW OF PROPERTY, *supra* note 21, at 735. At common law, dower was a life estate in one-third of the lands of which a husband had been seized at any time during coverture. This interest vested only at the death of the husband, yet was protected throughout the marriage since a wife must have joined in any conveyance by her husband else her dower attached to such property at her husband's death. *See generally id.* §§ 5.1-5.49.

[26] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 402 (2d ed. 1923); W. TIFFANY, *supra* note 19, at 144-45.

[27] Dower and intestate succession were rights of the Delaware wife discussed in *Davis*. The third interest of the wife, her right to a reasonable share of her husband's property upon divorce, did not exist at common law. *See* note 61 *infra*.

[28] Crozier, *supra* note 18, at 28. Ms. Crozier, no doubt Miss or Mrs. Crozier in 1935, was specifically criticizing the old common law rule that a husband owned his wife's labor and earnings, but the language also describes the entire early common law marital relation.

the rents and profits therefrom, and any property she receives by descent, devise, or gift now remains her separate property after her marriage, subject only to her disposal and her debts.[29] She may sue or be sued in her own right.[30] She is entitled to earnings from her own business or employment,[31] and may make her own contracts.[32] In addition, a wife in Colorado, just as in all common law property jurisdictions,[33] still retains her right to be supported by her husband.[34]

Lest it seem that a Colorado wife has the best of both old and new worlds,[35] namely the right to own her own property as well as the right to demand support from her husband, consider a wife in a community property jurisdiction.[36] Spouses in community property states are viewed as equal partners with a vested one-half interest in all the wealth acquired by the efforts of either.[37] Since both spouses are deemed to contribute equally, a community property wife is a one-half owner of such property despite the fact that she may produce less income than her husband, or no income at all. Community property husbands are also required to support their wives.[38] In contrast, "with a possible exception or two,"[39] a Colorado wife has no vested interest in the property

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[29] COLO. REV. STAT. ANN. § 14-2-201 (1973).

[30] *Id.* § 14-2-202.

[31] *Id.* § 14-2-203.

[32] *Id.* § 14-2-208.

[33] Phipps, *Marital Property Interests*, 27 ROCKY MTN. L. REV. 180, 184 (1955).

[34] COLO. REV. STAT. ANN. § 14-6-101 (1973) provides that failure to support and maintain a wife, and children under 16 years of age, is a felony. This statute is viewed as enforcing, not creating a husband's duty of support. Kilpatrick v. People, 64 Colo. 209, 170 P. 956 (1918). A wife's right to support seems to be better protected today than at common law, which provided no direct action to enforce a husband's duty of support. Phipps, *supra* note 33, at 185 n.18. Now the Revised Uniform Reciprocal Enforcement of Support Act, COLO. REV. STAT. ANN. §§ 14-5-101 to -143 (1973) provides a civil in addition to the criminal remedy for nonsupport. *See* Conrad v. McClearn, 166 Colo. 568, 445 P.2d 222 (1968).

[35] For an excellent comparison of the status and rights of wives in the United States and those in other countries see Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TULANE L. REV. 21 (1974).

[36] Very briefly, a community property jurisdiction is one in which the property "the husband and wife have is common property, that is, it belongs to both by halves." W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 1 (2d ed. 1971) [hereinafter cited as DE FUNIAK].

[37] *Id.* § 1, at 2.

[38] *Id.* § 133, at 328 & n.10.

[39] *In re* Questions Submitted By United States Dist. Ct., 517 P.2d 1331, 1335 (Colo. 1974) (*Imel*).

of her husband. Thus, for the great number of wives who do not have separate property of their own, or who, because they earn less than their husbands, have less property than their husbands, the marriage partnership is one in which they are the junior partner.

Perhaps the central feature of Colorado marital law is that a husband has separate property, free of any interests of his wife. Yet there are at least three[40] restrictions in favor of a wife which limit a Colorado husband's rights in his separate property. They are his wife's rights to 1) support, 2) intestate succession, and 3) a share of her husband's property upon divorce.[41] As will be seen from the following discussion, and from the opinions of the Colorado Supreme Court,[42] none of these interests make a wife in any way a co-owner in the separate property of her husband.

1. Right of Election and Intestate Succession

In Colorado a wife has the right of intestate succession.[43] Prior to the adoption of the Colorado Probate Code[44] the precise nature of a wife's right to inherit the property of her husband, and her right to elect against his will,[45] was somewhat unclear. While these rights give her some interest in the property of her husband, the interest can be defeated by her husband. By conveying his property prior to his death, he could leave her with nothing. This is illustrated by an excerpt from *Richard v. James*,[46] where a

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[40] In addition a wife also has an interest in the couple's homestead in that it may not be conveyed solely by the husband. COLO. REV. STAT. ANN. § 38-35-118 (1973). Dower and curtesy have been abolished by statute in Colorado. *Id.* § 15-11-113.

[41] Subsumed in the category of support are a wife's statutory rights to maintenance (alimony) and child support. *Id.* §§ 14-10-114 to -115. Only intestate succession and the right to a share upon divorce will be discussed here. Regarding the taxation of the husband's personal obligations of support see Graves, *supra* note 3.

[42] *See, e.g., In re* Questions Submitted By United States Dist. Ct., 517 P.2d 1331, 1334, 1335 (Colo. 1974) (*Imel*).

[43] COLO. REV. STAT. ANN. § 15-11-102(1) (1973) provides that the intestate share of a surviving husband or wife is:

(a) If there is no surviving issue of the decedent, the entire intestate estate;

(b) If there are surviving issue all of whom are issue of the surviving spouse also, the first twenty-five thousand dollars, plus one-half of the balance of the intestate estate;

(c) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

[44] COLO. REV. STAT. ANN. §§ 15-10-101 to -17-101 (1973).

[45] The surviving spouse's right to elect is now *id.* §§ 15-11-201 to -202.

[46] 133 Colo. 180, 292 P.2d 977 (1956) (en banc).

widow attempted to set aside her husband's transfer of most of his property into a trust less than a month before his death:

> There no longer remains a question of doubt of the power of a husband to convey his property during his lifetime to whomsoever he sees fit; even though it has the effect of depriving the wife of all right to inherit any part thereof, provided the transaction is bona fide and not merely colorable. This is true even though the express purpose of the conveyor is to deprive another of his right of inheritance. If the deed is genuine it cannot be said to be invalid.[47]

If the conveyance is fraudulent, or "colorable,"[48] a Colorado wife may have some chance of setting it aside. Yet *Richard v. James* shows that the express purpose of depriving a wife of her right of inheritance does not make a conveyance fraudulent.[49] Neither does the fact he may have reserved a life estate, or some other interest or powers.[50] Plainly, it is difficult to characterize a husband's transfer as fraudulent.

The right of election given a surviving spouse under the Colorado Probate Code greatly enhances a wife's right of inheritance. The prior statute[51] merely granted the right to elect, despite the provisions of his will, to take one-half of the property owned by a husband at his death. Under case law such as *James* this was an empty right if he had made substantial inter vivos transfers, leaving little from which to take one-half.[52] Under the Code, however, a wife may elect[53] to take one-half of her husband's "augmented estate."[54] This estate includes not only property held by a husband at death, but also the value of property tranferred by him at any time during the marriage to someone other than his wife

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[47] *Id.* at 184, 292 P.2d at 979. This case and this topic in general are carefully discussed in Rea, *Election to Take the Statutory Share*, 29 ROCKY MTN. L. REV. 506, 531 (1957) and Scott, *The Revocable Trust and the Surviving Spouse's Statutory Share in Colorado*, 36 COLO. L. REV. 464, 466 & n.8 (1964).

[48] The Colorado cases speak of a husband "defrauding" his wife by a conveyance. But the term "fraud" has been generally used to define only the extreme situation in which the husband executes a deed which is in truth a sham and is not intended as a conveyance at all, *i.e.*, a "colorable" deed. *See* Rea, *supra* note 47, at 525, 529.

[49] *See* Scott, *supra* note 47, at 471.

[50] Hageman v. First Nat'l Bank, 514 P.2d 328 (Colo. Ct. App. 1973). *See* Scott, *supra* note 47, at 469-72 for a discussion of factors courts may have considered prior to the Colorado Probate Code.

[51] Ch. 276, § 1, [1961] Colo. Sess. Laws 864-65.

[52] *See* Schmidt, *Family Protection Under the Uniform Probate Code*, 50 DENVER L.J. 137, 145 (1973).

[53] COLO. REV. STAT. ANN. § 15-11-201 (1973).

[54] *Id.* § 15-11-202, which defines the estate.

without full consideration and in which transfer he retained a right of possession, enjoyment, or income from the property; a power to revoke, consume, invade, or dispose for his own benefit; or whereby he held with another with a right of survivorship; or where transfer was made without any of the above but within 2 years of death to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.[55] By exercising her right to elect one-half of the aforementioned estate a wife may effectively set aside transfers by her husband which, prior to the adoption of the Code, would have defeated her right to inherit his property.

Much of the pre-Code case law is overruled. However, as to transfers in which a husband retained no interest nor power, and which were made more than 2 years prior to death, a wife would have to rely on pre-Code case law to vindicate her right to inherit such property. Those cases offer very little remedy.[56]

A Colorado wife, then, is granted only a limited interest in her husband's separate property by virtue of her right of intestate succession. The most significant feature about this right is that in Colorado, as in all common law property states, a wife must actually survive her husband in order to become vested with her share of his intestate estate.[57] This right is a mere expectancy; should she predecease her husband, her right of intestate succession is lost and does not pass to her heirs. On the other hand, a cardinal principle of community property jurisdictions is that a wife's one-half interest in the community property[58] passes to her heirs if she predeceases her husband.[59] Moreover, a Colorado wife's right to elect against her husband's will is also a personal

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[55] *Id.*

[56] *See* Schmidt, *supra* note 52, at 145-46.

[57] COLO. REV. STAT. ANN. § 15-11-102 (1973) grants an intestate share only to a *surviving* spouse. Section 15-11-104 even requires that a spouse must survive the deceased spouse by 120 hours, else he or she is deemed to have predeceased the decedent and the decedent's property passes to other heirs.

[58] A community property wife's interest is especially significant where she has made few financial contributions. She has a vested one-half interest in what would be, in a common law state, the separate property of her husband.

[59] DE FUNIAK § 1, at 2:

> The community property system is marked by two essential characteristics: (1) the transmissibility of the wife's interests to her heirs, so that if the wife dies first, her heirs take the share to which she would have been entitled if she had survived; and (2) during the existence of the marital relationship the spouses are . . . joint owners, or partners . . . .

right which disappears if unexercised prior to her death, and does not pass to her heirs.[60]

2. Right to Property at Dissolution

A wife's right to a share of the property of her husband upon divorce was unknown to the common law and is of statutory origin.[61] In the past such Colorado statutes have consistently been interpreted as not vesting in a wife any interest in her husband's property until the court actually orders the division. However, it appears that she might prevent or set aside fraudulent conveyances intended to defeat her right to a division of property analogous to her remedy with regard to inheritance.[62]

It is apparent that in Colorado the absence of any significant interest of a wife in her husband's property during their marriage is not cured by her statutory right to a share of his property upon divorce. Her share, besides being undetermined, may be soundly and entirely defeated prior to the decree because it is an expectancy, not a property right. In *Todd v. Todd*[63] the Colorado Supreme Court held that the husband's trustee in bankruptcy could defeat the wife's statutory right to share in the property of her husband when the date of bankruptcy occurred after an interlocutory decree had given her possession of the property, after the final decree of divorce, and after the hearing concerning division of property, but before the court had made an order actually awarding her a share of her husband's property. Obviously, her right to a share at divorce was not such that it gave her any protectible interest prior to the actual award of her husband's property. Her expectancy was defeated because "[d]ivision of

[60] This was true of the pre-Code right as construed by the Colorado courts. *See* Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927) and Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912). The present Code expressly states that the election is a right which may be exercised only during the lifetime of the surviving spouse. COLO. REV. STAT. ANN. § 15-11-203 (1973). Should it not be exercised, a wife who had received nothing under the will would leave nothing therefrom to her heirs, and they would be unable to exercise the right for her.

[61] 2 J. BISHOP, NEW COMMENTARIES ON THE LAW OF MARRIAGE, DIVORCE, AND SEPARATION §§ 1117, 1139 (1891).

[62] *See, e.g.*, Zingone v. Zingone, 136 Colo. 39, 314 P.2d 304 (1957), wherein the Colorado Supreme Court reversed and remanded a dismissal of a wife's counterclaim against her husband's parents to recover the house he had conveyed to them. The court said the wife was in a position similar to that of a creditor whose debtor had fraudulently conveyed property, or a wife whose husband had conveyed property to defraud his wife of her right to support and maintenance.

[63] 133 Colo. 1, 291 P.2d 386 (1956).

property, [and] property settlements . . . are within the sound discretion of the trial court *and no rights vest until the matters involved are determined.*"[64]

Similarly, *Du Bois v. First National Bank*[65] held that a wife who has been awarded a one-third interest in certain realty of her husband must take that interest subject to a mortgage given by her husband after their marriage but prior to her action for divorce. Consequently, the interest awarded could be foreclosed by the mortgagee. The court stated that the bank's knowledge of their martial problems did not apprise it of the fact that she would obtain a decree of divorce and an interest in her husband's property, and that even "if the bank could foresee such an end to their unhappiness, its lien on the property, taken in good faith, would not be subordinate to the purchaser's title which she subsequently secured."[66] It can be concluded that a wife's right to a share at divorce does not give her an interest which is safe from an encumbrance created by her husband, even one created after their marriage.

Finally, in *Dickinson v. Dickinson*[67] a wife, suing to set aside a fraudulently induced property settlement, was awarded one-half of her husband's net worth at the time of their divorce, less the amount already received pursuant to the agreement. Her action was not to annul the decree so that the court might make an equitable division of property. Instead, her argument rested solely upon the contention that she was entitled, by virtue of their marital relationship, to one-half of the property owned by her husband at the time of the divorce. In reversing, the court held that her counsel's contention

> that she is entitled to a share of the defendant's property, solely because it was acquired by the defendant during the period the marriage relation existed between them, without regard to the divorce proceedings. . . . is not tenable. The property acquired by the defendant during the period he was married to plaintiff belonged to him. Plaintiff had no such interest in this property as would invest her with the right to maintain an action, the sole purpose of which was to secure any part of it, either during coverture or after the

[64] *Id.* at 5, 291 P.2d at 387 (emphasis added).

[65] 43 Colo. 400, 96 P. 169 (1908).

[66] *Id.* at 404, 96 P. at 170. The court also found that Mrs. DuBois had failed to prove fraud in the transaction.

[67] 50 Colo. 232, 114 P. 652 (1911).

> marriage relation had been dissolved. . . . [T]he judgment . . . must be reversed, and the cause remanded, with directions to dismiss. . . .[68]

All of this is not to say that a wife is not entitled to a share of her husband's property upon divorce. That is not the question. The issue is the nature of her right to receive such a share. Colorado, and other common law property states, have chosen to make that right an equitable one which does not vest in her any interest in her husband's property. Nor, absent fraud, may she prevent her husband from conveying or encumbering any of his separate property. It apparently has never even been suggested in Colorado that her right is descendible so that it would go to her heirs should she predecease her husband. Instead of a system of community property wherein each spouse is entitled to one-half of the community property at the dissolution of the marriage,[69] Colorado's system allows a husband to retain his separate property subject to an equitable share for his wife upon dissolution. In determining how much of her husband's property a wife should receive, Colorado courts have, pursuant to the various statutes,[70] traditionally considered

> whether the property was acquired before or after marriage, the efforts and attitudes of the parties towards its accumulation, the respective ages and earning abilities of the parties, the conduct of the parties during the marriage, the duration of the marriage, their stations in life, their health and physical condition, the necessities of the parties, their financial condition, and all other relevant circumstances.[71]

As to the efforts of a wife in the accumulation of property by her husband,[72] courts have often considered her contribution as a housewife in making an equitable division.[73] Naturally, where a wife has participated in the operation of a joint business with her

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[68] *Id.* at 235, 114 P. at 653.

[69] Again, a community property wife's right to one-half of the community property is most significant, in comparison to that of her common law counterpart, when the wife makes only small financial contributions to the community property. In that situation, she would have a vested one-half interest in property which in a common law state, would be the separate property of her husband.

[70] Colorado's old statute provided that property be divided "in such proportions as may be fair and equitable." Ch. 37, § 6, [1958] Colo. Sess. Laws 223.

[71] Carlson v. Carlson, 497 P.2d 1006, 1009 (Colo. 1972) (citations omitted).

[72] Of course, property acquired by a wife with her own funds is her own separate property.

[73] *See, e.g.*, Schrader v. Schrader, 156 Colo. 521, 400 P.2d 675 (1965).

husband or contributed similar nondomestic efforts, that too will be considered by the court.[74] In all cases the division is within the sound discretion of the trial court.[75]

The Tenth Circuit considered the nature of a wife's property rights in Colorado, and whether a husband should be taxed on his transfer of appreciated property to her upon divorce, in *Pulliam v. Commissioner*.[76] It noted that "[u]nder Colorado law the wife's rights during marriage do not vest in her an ownership of any part of the husband's property."[77] And because "the wife's interests are very similar to those in Delaware considered in United States v. Davis,"[78] it held that the transfer pursuant to the divorce decree was a taxable event for the husband.

Now, some 12 years later, the Colorado Supreme Court has held in *Imel* that there is an exception to the rule stated in *Pulliam* that a Colorado wife has no vested interest in the property of her husband during the marriage. The exception is that "vesting takes place at the time of the filing of the divorce action."[79] In creating that exception, the court followed the philosophy of the Oklahoma Supreme Court expressed in *Collins v. Oklahoma Tax Commission*[80] and modified in *Sanditen v. Sanditen*.[81]

In *Collins v. Commissioner*,[82] called *Collins I*, the Tenth Circuit, relying on its decision in *Pulliam*, held that an Oklahoma husband was taxable in a divorce property settlement. The husband had argued that the Oklahoma property division statute, by commanding a court to make a division of jointly acquired property,[83] thereby vested an interest in each spouse in such property.

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[74] *See, e.g.*, Bell v. Bell, 156 Colo. 513, 400 P.2d 440 (1965). Also, where a wife is jointly operating a business with her husband and is contributing her own funds, she is a joint tenant although title is in her husband's name. Therefore, at divorce she is entitled to her share as a joint tenant and "not claiming in the capacity of [a] wife." Wigton v. Wigton, 73 Colo. 337, 341, 216 P. 1055, 1057 (1923). This is distinguishable from the facts in *Imel*, where Mrs. Imel contributed her efforts to her husband's business, but not her own funds. For that reason *Imel* more closely resembles *Bell*.

[75] *See, e.g.*, Nunemacher v. Nunemacher, 132 Colo. 300, 287 P.2d 662 (1955).

[76] 329 F.2d 97 (10th Cir. 1964).

[77] *Id.*

[78] *Id.* at 99.

[79] 517 P.2d at 1333.

[80] 446 P.2d 290 (Okla. 1968).

[81] 496 P.2d 365 (Okla. 1972).

[82] 388 F.2d 353 (10th Cir. 1968).

[83] The statute, OKLA. STAT. ANN. tit. 12, § 1278 (1961) provides that as to property

Acknowledging that *Davis* required an examination of state law, the Tenth Circuit could find no difference between Oklahoma and Colorado law sufficient to compel a result opposite that reached in *Pulliam*. The wife's right to a share of her husband's property, where such was jointly acquired, vested no interest in her during the marriage, notwithstanding the language of some early Oklahoma cases.[84] This right was not descendible,[85] its quantum was within the discretion of the court, and it gave her no right to manage or dispose of the property in question.[86] As in Colorado, a wife's right to a share in Oklahoma failed the *Davis* tests.

Neither did the Tenth Circuit find that the other right of an Oklahoma wife, that of intestate succession, made her a co-owner. As in Colorado, an Oklahoma wife must survive her husband to receive her intestate share, and should she predecease him, her right of intestate succession would not pass to her heirs.[87]

"acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable . . . ." Jointly acquired property is not defined in the statute, but from the cases it is clear that where a wife performs only domestic duties she is contributing to the acquisition of property, so that most property acquired during the marriage would be jointly acquired. *See* Note, *Domestic Relations: Relevant Factors in the Division of Jointly Acquired Property*, 23 OKLA. L. REV. 288, 289 (1970).

[84] The Tenth Circuit had some difficulty with Davis v. Davis, 61 Okla. 275, 161 P. 190 (1916) which stated that a wife did have a vested interest in her husband's property. A careful reading of that case shows that the court meant that a wife's statutory right to have a division of property, wherein she might get some interest, was a vested right which could not be defeated by her misconduct. This is a much flimsier right than a vested interest in property and could be called a vested right in an expectancy.

[85] *Citing* Jones v. Farris, 180 Okla. 341, 69 P.2d 344 (1937) wherein the Oklahoma Supreme Court held that the mandatory division of property section of the divorce statute did not vest in a wife a right in jointly acquired property which would pass to her heirs upon her death.

[86] Consequently, the language of Thompson v. Thompson, 70 Okla. 207, 173 P. 1037 (1918) labeling jointly acquired property as being similar to community property fails to make a wife a co-owner under the *Davis* tests.

[87] Oklahoma has a peculiar statute which gives a wife a greater right of intestate succession than does Colorado or other common law property states. OKLA. STAT. ANN. tit. 84, § 213 (1970):

> Second . . . . Provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, *if any of the said property remain*, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation. (Emphasis added).

Under this statute a wife's heirs might receive her share of jointly acquired property

Shortly after *Collins I* the Oklahoma Supreme Court was called upon to determine Mr. Collins' tax liability on the same property settlement, this time under an Oklahoma tax statute[88] very similar to section 1001 of the Internal Revenue Code. Referred to as *Collins II*,[89] the issues were identical to those considered by the Tenth Circuit in *Collins I*. While the Oklahoma Supreme Court decided the husband's liability only under the state statute, it clearly rejected the reasoning of the Tenth Circuit regarding the similar federal statute and concluded that the Oklahoma statute providing for a mandatory division of jointly acquired property gave a wife a vested property interest therein.[90]

The court relied upon *Davis v. Davis*[91] for the proposition that a wife has a vested interest in jointly acquired property. Yet that case held only that the wife's statutory right to a share upon divorce is not forfeited because she was at fault in the divorce action.[92] Citing *Williams v. Williams*,[93] the *Collins II* court stressed that the kind of property which may be divided at divorce, jointly acquired property, is not subject to the discretion of the court. However, the kind of discretion which *United States v. Davis* implied was inconsistent with the notion that a wife was a co-owner was the court's discretion to make a "reasonable" division of property.[94] *Collins II* based its conclusion that an Okla-

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even when she predeceases her husband. This does not mean, however, that an Oklahoma wife, just as a community property wife, has a vested interest in such property which would always pass to her heirs even when she predeceases her husband. The surviving husband's dissipation of the jointly acquired property, or his remarriage, could leave her heirs with nothing. Consequently, the Oklahoma Supreme Court has said this statutory rule is not a rule of property but a rule of descent and distribution. Essex v. Washington, 198 Okla. 145, 176 P.2d 476 (1946).

[88] The Oklahoma statute is now OKLA. STAT. ANN. tit. 68, § 2310 (1966).

[89] Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (1968).

[90] *Collins II* contains little discussion of intestate succession. The court acknowledged that the statute governing intestate succession was a rule of descent and distribution, not of property. *Id.* at 296. *See* note 87 *supra*.

[91] 61 Okla. 275, 278, 161 P. 190, 193 (1916).

[92] *See* note 84 *supra*.

[93] 428 P.2d 218 (Okla. 1967).

[94] 370 U.S. at 70. The Oklahoma divorce statute, like Delaware's, empowers the court to "make such division between the parties respectively as may appear just and reasonable . . . ." OKLA. STAT. ANN. tit. 12, § 1278 (1961). Also to distinguish the facts in *Davis*, the *Collins II* court stated, in dictum, that factors traditionally considered by divorce courts, such as the financial needs of the spouses, were not to be considered in Oklahoma. Only the actual efforts and money contributed by the parties should be considered. Presumably, it might then be said that the court was not actually exercising any discretion at all in dividing property. 446 P.2d at 296-97. Ignoring financial need has been criticized as

homa wife's interest was similar to that of a wife in a community property state upon *Thompson v. Thompson*.[95] While that case contained some very broad language, it merely held that a husband could be awarded jointly acquired property which was held in the name of his wife. The case did not hold that spouses in Oklahoma have the same rights as those in community property states. Finally, the court concluded that Colorado law was so different from Oklahoma's[96] that *Pulliam* was not controlling. Nor was it bound by the Tenth Circuit's holding in *Collins I* that an Oklahoma wife's right to a statutory share upon divorce did not make her a co-owner under the *Davis* tests, because the operation of the Oklahoma divorce statute is not affected by the absence of "a right to make present disposition of property, nor absence of a descendable interest. A wife has a vested interest in jointly acquired property of the marital community [by virtue of that statute]."[97]

It is certainly true that the *Davis* criteria of descendibility, management, and the right of disposition do not control the operation of the Oklahoma divorce statute. A wife in that state may claim her share under that statute regardless of *Davis*. The issue, however, is whether the interest given an Oklahoma wife by that statute is such that, using the *Davis* criteria, she is a co-owner claiming her one-half of the marital property, or whether, as in

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harsh and has not been consistently followed by the court since *Collins II*. Note, *supra* note 83, at 291.

Moreover, the fact the division is solely on the basis of the parties' contributions is not sufficient to avoid *Davis*. There the Supreme Court did imply that a discretionary division was inconsistent with the concept of a vested interest in the wife. But the Court also required more—that the wife's alleged property interest be descendible, and that she be able to manage or dispose of it—else she was not a true co-owner.

[95] 70 Okla. 207, 173 P. 1037 (1918).

[96] The few differences are: 1) Only contribution is to be considered in Oklahoma, although domestic contributions are sufficient; 2) A property division is mandatory in Oklahoma; and 3) There is some difference in the rights of an Oklahoma wife's heirs to receive property of a surviving husband, although the Oklahoma Supreme Court ignored this in *Collins II*.

[97] 446 P.2d at 297. By this the court obviously meant to deny the applicability of the *Davis* tests. Yet it attempted to bolster the wife's interest by saying it was exercisable "at any time during marriage, even though she is not entitled to divorce." *Id.* Apparently the court was referring to a wife's right to a division of property in a separate maintenance proceeding. OKLA. STAT. ANN. tit. 12, § 1275 (1961). However, that she is entitled to a division absent a divorce does not greatly enhance her interest in her husband's property. She is still unable to control it, or to make a present or testamentary disposition. Under *Davis*, she is still not a co-owner, and this division ought to be as taxable as one pursuant to a divorce.

Davis, her interest does not reach the dignity of co-ownership. From that perspective, it is inconsequential that the Oklahoma court labels the interest that she has under the statute as "vested." Whether vested or not, does it meet the *Davis* criteria? The Tenth Circuit had the opportunity to answer that question in *Collins IV*[98] when its *Collins I* decision was vacated and remanded by the Supreme Court, called *Collins III*,[99] for further consideration in light of the Oklahoma Supreme Court's opinion in *Collins II*. The opinion of the U.S. Supreme Court was one paragraph in length and did not purport to limit its earlier *Davis* decision. Nor did it discuss the merits of *Collins II*. Nevertheless, the Tenth Circuit reversed itself and held that the factors in *Davis* were not "federal criteria"[100] which must be met by state law before a wife's rights could be considered those of a co-owner. The language of *Davis* is to the contrary.[101] The Tenth Circuit's opinion is supportable though, since it concluded that by *Collins II* the Oklahoma Supreme Court had proclaimed wives in that state to be co-owners of property jointly acquired during the marriage. If that is what *Collins II* proclaimed, the Oklahoma Supreme Court has since changed its mind.

In *Sanditen v. Sanditen*,[102] which was not a divorce action, an Oklahoma wife seized upon the vested property right given her by *Collins II* and on that basis attempted to recover from her husband her portion of property jointly acquired that he had given away gratuitously without her knowledge or consent. The Oklahoma Supreme Court held that *Collins II* had not given her such an interest. The *Sanditen* court said *Collins II* held only that the wife's right to property, granted by the mandatory property division section of the divorce statute, became vested during the

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[98] 412 F.2d 211 (10th Cir. 1969).

[99] 393 U.S. 215 (1968)(per curiam). This is the entire opinion:

> The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of the opinion of the Supreme Court of Oklahoma in [*Collins II*].

[100] 412 F.2d at 212.

[101] 370 U.S. 65, 70 (1961). By the Court's holding that state "tags" did not change the fact that Delaware law places only a burden on her husband's property, rather than make her "a part owner thereof," it is apparent the Court ignored state labels and looked to the substance of state law. *See* text accompanying notes 125-26 *infra*; *accord*, Wallace v. United States, 309 F. Supp. 748, 760-61 (S.D. Iowa 1970), *aff'd*, 439 F.2d 757 (8th Cir. 1971).

[102] 496 P.2d 365 (Okla. 1972).

pendency of the divorce action.[103] Further, a wife has no vested interest in property jointly acquired, for if she had that would make Oklahoma a community property jurisdiction, which it is not.[104] Therefore, except during the pendency of a divorce action a wife in Oklahoma is not a co-owner.[105]

A leak sprung in the dike fashioned by *Sanditen*. In *McDaniel v. Oklahoma Tax Commission*,[106] a husband transferred to his wife property held in his name but acquired by their joint efforts during their marriage. He claimed that under *Collins II* his wife already had a vested interest in the property and in effect was a co-owner, so that the division did not constitute a gift by him which could be taxed. After noting that it had made several pronouncements in *Collins II* not necessary to support the result reached,[107] the court reiterated its holding in *Sanditen* that an Oklahoma wife is vested with an interest in jointly acquired property only during the pendency of a divorce. Interestingly, the court stated that where there was no divorce action the jointly acquired property is owned by the husband.[108] He has the sole power of disposition; he alone can transfer it; he is liable for the property taxes thereon; and his wife has no descendible interest therein.[109]

III. *Imel* AND *Davis*

The Colorado Supreme Court expressly followed *Collins II*, *Sanditen*, and *McDaniel* in its *Imel* decision. The court held that while in general a wife had no interest in the property of her husband,[110] such an interest was vested in her upon the filing of

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[103] *Id.* at 367.

[104] *Id.*

[105] This did not mean that Mrs. Sanditen was not entitled to relief. The court held that although she had no vested interest until a divorce action was commenced, she could prevent or recover conveyances made by her husband to defraud her right to a share of property upon divorce. The same right exists in Colorado, *see* note 62 *supra*.

[106] 499 P.2d 1391 (Okla. 1972).

[107] *Id.* at 1393. One of which evidently was that a wife is, in general, a co-owner or one with a vested interest.

[108] *Id.* at 1394.

[109] *Id.*

[110] 517 P.2d at 1334-35. From the cases cited the court meant by this that a wife could prohibit transfers to defraud her of her right of intestate succession. *See* text accompanying notes 43-56 *supra*. The court made no mention of those cases allowing a wife to prohibit fraudulent transfers prior to a divorce.

a divorce action.[111] The court found no significant difference between the Oklahoma and Colorado divorce statutes pertaining to the mandatory division of property.[112] It went a step beyond either *Sanditen* or *McDaniel* when it declared that it was not "concerned" with the situation in which "one of the parties dies or the action is dismissed prior to a decree of divorce or prior to a division of property."[113] The wife's right was inchoate only in that prior to the division the particular property to be transferred had not been determined.[114] After the filing her rights are analogous to those of a wife who has a resulting trust in the property of her husband, so that it is not necessary, after the filing, for both spouses to join in the conveyance of property held in the name of only one of them.[115] It is submitted that the interest described by the court in *Imel* is not, applying the *Davis* tests, sufficient to make her a co-owner. But then assuming, *arguendo*, that she does become a co-owner upon the filing of a divorce action, the fallacy of holding that there is no taxable transfer in such a situation is easily illustrated.

It is admitted by both the Oklahoma and Colorado Supreme Courts that prior to the filing of a divorce action, a wife has no interest in the property of her husband. Her interest, unlike that of wives in community property states, arises from the transfer mandated by the property division portions of the divorce statute.[116] That this interest vests upon the filing of a divorce action, if true, should be a taxable event in itself. Presumably the wife suddenly has become a co-owner. By filing her action she has what is in effect a vested undivided interest as a joint tenant. The fact that it is undivided should not make a difference for tax purposes.[117] It is not uncommon for a divorce court to fashion a property settlement in which there is not a partitioning of the property, but rather where the former spouses are made joint

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[111] *Id.* at 1332, 1334, 1335.

[112] *Id.* at 1334.

[113] *Id.* at 1335. By this the court implied that the wife's interest "vested" upon filing the divorce action, but should the action be dismissed, or one of the spouses die, she would lose her interest. The district court described her interest as a vested one subject to divestment. 375 F. Supp. at 1118.

[114] 517 P.2d at 1335.

[115] *Id.*

[116] *Collins II*, 446 P.2d at 296-97. *Imel* relies upon *Collins II* in general and seems to have reached the same conclusion. 517 P.2d at 1334-35.

[117] There are apparently no reported cases directly on point.

tenants in the property acquired by the husband.[118] Since she was not a co-owner prior to the transfer, why should that transfer not be taxable as the one in *Davis*? In *Davis* the wife actually received her husband's property prior to the divorce, yet that was a taxable disposition because prior to that time she was not a co-owner. The same reasoning applied to *Imel* and *Collins II*. Prior to the time of the alleged vesting the wife was not a co-owner. Consequently that vesting, like the transfer in *Davis*, could be viewed as a taxable event.

A better interpretation of *Imel* and *Collins II* is that, instead of receiving a vested interest which makes her a co-owner, a wife's marital rights, after the filing of a divorce action, become protectible by the court. *Imel* was not "concerned"[119] with situations in which the wife died after filing her action. And since the court did not reverse its earlier holdings,[120] it can be inferred that should a wife die, her interest would not be descendible. Presumably neither could she dispose of her share, nor begin to manage or control it. In addition her husband may convey property without joining her. Given the limited nature of the wife's rights, even after vesting, it is clear that whatever right she has is not the same right as that of a co-owner. All that is accomplished by the vesting is that the wife's interest thereafter may be protected by the court even though its quantum is as yet undetermined.[121] That, however, adds nothing to the rights a wife had before these cases. In Colorado a wife has been able for some time to prevent transfers to defraud her.[122]

While neither *Imel* nor *Collins* II expressly purports to govern the federal taxation of property settlements,[123] both courts re-

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[118] In McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962) the court decreed that property owned by the spouses in joint tenancy should remain in joint tenancy after their divorce. Oklahoma favors a partitioning, but has upheld a decree making a division of property by designating the spouses as tenants in common. Smith v. Smith, 206 Okla. 206, 242 P.2d 436 (1952).

[119] 517 P.2d at 1335.

[120] *See* text accompanying notes 43-56 and 60 *supra*.

[121] 517 P.2d at 1335.

[122] *See* note 62 *supra*. The current Colorado statute enables the court to issue a temporary injunction restraining either spouse from transferring or encumbering any property after the commencement of proceedings for the dissolution of marriage. COLO. REV. STAT. ANN. § 14-10-108(2)(a) (1973). The prior statute allowed a similar order. Ch. 37, § 6, [1958] Colo. Sess. Laws 223.

[123] Nevertheless, the court in *Imel* stated that

> [i]n Colorado a wife may have a certain species of common ownership in

jected the rule in *Davis* that co-ownership was to be determined with reference to federal criteria.[124] It is submitted that when state and federal decisions are in conflict, the findings of federal courts regarding the federal taxation of state-created property rights should prevail regardless of the label given these rights by the state courts.

IV. State and Federal Conflicts

Davis itself did not elucidate carefully the role played by state laws and state court decisions in federal income taxation. It did make clear that whether a wife was a co-owner so that there was no taxable disposition of property by her husband was a question of federal and not state law.[125] By that holding the Supreme Court did not presume to control the rights of the parties under state law. That the Court did attempt to do so is the straw man created by state decisions.[126] Instead, the Court meant that the operation of the federal taxing statutes upon state-created rights cannot be determined by state law, but must be determined by referring to the objects intended to be taxed by the federal statute. There is much support for this conclusion.

The oft cited[127] case of *Burnet v. Harmel*[128] held that Texas' characterization of an oil and gas lease as a sale rather than a lease did not prevent the federal income tax statute from taxing the "sale" as if it were a lease. The taxpayer argued that if Texas law classified the transaction as a sale, it must be taxed as a sale and not as a lease. The federal act taxing sales of this kind of asset[129] imposed a lower tax than the section which taxed leases of the same property. The Court flatly rejected the taxpayer's

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> the husband's property which will not prevent a taxable transfer from occurring when he makes a transfer to her. If so, that is distinguishable from the species of common ownership which vests upon the filing of the divorce action.

517 P.2d at 1335.

[124] *Collins II* said that the right to make a disposition of her interest and the lack of its descendibility were not controlling. 446 P.2d at 297. *Imel*, besides its general adoption of *Collins II*, simply ignored the criteria, stating it was not "concerned" with the situation in which a spouse died, and declared that a transfer of property pursuant to a settlement resembled a division of property between two co-owners. 517 P.2d at 1334-35.

[125] 370 U.S. at 70.

[126] As where the Oklahoma Supreme Court in *Collins II* held that the *Davis* factors did not control the operation of Oklahoma's divorce statute. 446 P.2d at 297.

[127] *See, e.g.*, 10 J. Mertens, Law of Federal Income Taxation § 61.02, at 2 (1970).

[128] 287 U.S. 103 (1932).

[129] Revenue Act of 1924, ch. 234, § 208(a), 43 Stat. 262.

argument that whether a sale had occurred depended upon the law of the State of Texas. The federal statute

> neither says nor implies that the determination of . . . [whether there was a sale] . . . is to be controlled by state law. For the purpose of applying this section to the particular payments now under consideration, the *Act of Congress has its own criteria*, irrespective of any particular characterization of the payments in the local law. The state law creates legal interests but the federal statute determines when and how they shall be taxed. We examine the Texas law only for the purpose of ascertaining whether the leases conform to the standard which the taxing statute prescribed . . . .[130]

The *Davis* Court, using a similar rationale, concluded that Congress, by its broad definition of income, intended that the appreciation of the stock transferred by the husband be taxed,[131] and that the controlling federal statutory language "sale or other disposition" of property included his transfer to his wife.[132] In other words, whether there is a taxable transfer from husband to wife or a nontaxable division between them is dependent upon the Court's interpretation of congressional intent regarding the taxation of interests or property created by the state. It does not depend, as *Imel* and *Collins* urge, upon the label or tag the state chose to give the wife's interest. The nature of the right created is to be determined by the federal court, which then determines whether that right is an object intended to be taxed by the federal statute.[133]

That a federal court may make an independent appraisal of state-created property rights, and then determine the effect of the federal tax statute upon a transaction involving those rights, is supported by the early case of *United States v. Robbins*.[134] A husband and wife domiciled in the community property state of

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[130] 287 U.S. at 110 (emphasis added)(citations omitted).

[131] 370 U.S. at 68.

[132] *Id.* at 71.

[133] *Accord*, Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940), where the Court determined that what Wisconsin called a special power of appointment was actually the same interest meant to be taxed under a statute which taxed general powers of appointment. While the act did not actually define a "general power of appointment," the *Morgan* Court, like the *Davis* Court, was able to determine Congress' intent in that regard. "If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law." *Id.* at 81. This process has been called the "economic realities" test. 10 J. MERTENS, *supra* note 127, at 3.

[134] 269 U.S. 315 (1926). *See generally* Swihart, *Federal Taxation of New Mexico Community Property*, 3 NATURAL RES. J. 104, 116-24 (1963).

California had attempted to file separate income tax returns whereby each would report one-half of the community income, which in their case was either earned solely by the husband or came from his separate property. The Treasury Department at that time did not permit the splitting of community income between spouses domiciled in California,[135] presumably because the interest of a California wife in the community property was insubstantial and amounted to a mere expectancy while her husband was alive.[136] The Court, in an opinion by Justice Holmes, affirmed the ruling of the Treasury Department. Holmes' opinion rested on the ground that California Supreme Court cases showed that the wife had only an expectancy. Unlike other community property jurisdictions, a California wife had no descendible interest in the community property. *Davis'* requirement that a wife must have a descendible interest in order to be a co-owner is thus in accord with *Robbins*. *Collins II* and *Imel* either ignore or deny the requirement that a wife have a descendible interest to be a co-owner. Neither of these decisions make the wife's interest descendible, nor does the prior case law.[137]

Subsequent to *Robbins*, California enacted a statute making the wife's one-half interest in the community property descendible,[138] and subsequently the Supreme Court held that California spouses could split their income.[139] Justice Holmes' dicta in *Robbins*—that a California husband could be taxed upon the whole of community income because he possessed extensive control over it[140]—was not followed in later cases. In *Poe v. Seaborn*,[141] one of several test cases which argued Holmes' dicta, the first-mentioned factor which indicated the substance of the wife's interest in the community property was her right to make a testamentary disposition.[142]

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[135] T.D. 3138, 4 CUM. BULL. 238 (1921) allowed income splitting in all the other community property states. Congress has, since 1948, provided for joint returns in all states. INT. REV. CODE OF 1954, §§ 2, 6013. There remain, however, income tax advantages for community property spouses who receive community income. *See* Swihart, *supra* note 134, at 126.

[136] 269 U.S. at 326.

[137] *See* text accompanying notes 43-56 *supra*.

[138] Ch. 18, § 1, [1923] Cal. Sess. Laws.

[139] United States v. Malcolm, 282 U.S. 792 (1931)(per curiam).

[140] 269 U.S. at 327.

[141] 282 U.S. 101 (1930). This case was cited in *Davis* for the proposition that until Congress granted relief (*e.g.*, joint returns) common law jurisdictions have fewer tax advantages than community property states. 370 U.S. at 71.

[142] 282 U.S. at 110. *See also* Goodell v. Koch, 282 U.S. 118, 121 (1930); Hopkins v.

Colorado and Oklahoma's description of a wife's interest in the property of her husband as "vested" subsequent to the filing of a divorce action does not change the result dictated by *Davis* or *Pulliam*. The rule is that the nature of the state-created right must be ascertained by a federal court which decides whether the right created or the transaction which occurred is the object to be taxed by the taxing statute.[143] So the conclusory label "vested" does not determine whether the essential federal criteria for co-ownership have been met. As has been seen, the wife's vested right is not descendible, it gives her no rights of management or disposition, and, certainly in the Colorado case, its quantum was subject to the discretion of the divorce court. Notwithstanding being "vested," the wife's rights are insufficient to prevent the operation of the federal tax upon the husband's transfer. This would by no means be the first instance of a federal court's disregarding a vested state property right in matters of federal taxation.[144]

CONCLUSION

Except for allowing a wife her separate property and earnings, little change has occurred in marital property law in com-

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Bacon, 282 U.S. 122, 126 (1930); Bender v. Pfaff, 282 U.S. 127, 131 (1930); Swihart, *supra* note 134, at 119-21.

[143] That principle has also been explained as follows:

> State law is not used for tax purposes in the same way that it is employed by a federal court exercising jurisdiction in diversity cases under the principle of *Erie R. R. v. Tompkins*. Under the *Erie* doctrine . . . state law furnishes the substantive rule of decision. In tax cases, on the other hand, the substantive rule is federal, and state law merely establishes some of the facts to which the court applies federal law in order to reach its conclusions. Whether or not a particular fact is to be established by means of state law is a matter of legislative intent.

Note, *The Role of State Law in Tax Determinations*, 72 HARV. L. REV. 1350, 1351 (1959) (footnotes omitted).

[144] The Tenth Circuit Court of Appeals, on April 30, 1975, heard oral arguments on the appeal of *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1974). The district court followed the opinion it received from the Colorado Supreme Court in response to the question it certified to that court. The Tenth Circuit has not yet decided the case. Dicta in two recent Tenth Circuit cases indicate that court favors the *Davis* rule. See Wiles v. Commissioner, 499 F.2d 255, 259 (10th Cir. 1974) and Hayutin v. Commissioner, 508 F.2d 462, 468 (10th Cir. 1974), where, referring to a wife's vested right announced in *Imel*, the court said

> [s]uch a characterization is not controlling for tax purposes. Rather, consideration must be given to the true nature of the transfer under Colorado law. When so viewed, it is apparent that Colorado places a burden upon the husband's property rather than making the wife a part owner thereof.

Id. (citation omitted).

mon law states,[145] including Colorado and Oklahoma. A wife in these states is not allowed a one-half interest in marital property[146] which she may manage and control, or dispose of presently or by will. Instead, she is entitled to her own property, which is often less than that of her husband. She is also given certain rights against the property of her husband should the marriage be dissolved by divorce or death, but these rights do not make her husband's property subject to her control or disposition.[147] In the case of divorce her interest is not even a fixed share.[148] As *Davis*

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[145] Johnston, *supra* note 18, at 1090:

> Beyond a married woman's separate property and outside earnings . . . there has been no fundamental change in marital property law. Wives are still expected to perform services in the home for their husbands without recompense beyond the limits of the husband's duty of support.

[146] Colorado's new Uniform Dissolution of Marriage Act defines marital property to be divided at dissolution as all property acquired by either spouse after the marriage except that acquired by gift, bequest, devise, descent, and some other property. COLO. REV. STAT. ANN. § 14-10-113(2) (1973). Marital property closely resembles community property. However, the statute does not make Colorado a community property state because it does not give a wife, or either spouse, any interest in the marital property which they did not already have in Colorado. Instead of changing Colorado into a community property state, the statute, by its express terms, merely specifies what property may be divided upon dissolution. *Id.*

[147] The Colorado Supreme Court in *Imel* evidently felt it could skirt this deficiency by holding that the right which vested upon filing a divorce action (which even then was not descendible) was inchoate prior to that time (and therefore naturally beyond the wife's control and disposition) only in the sense that the specific property to be transferred had not yet been determined. 517 P.2d at 1335. The weakness of this argument is that a true co-owner, such as a wife in a community property state, need not have her one-half interest specifically determined before she may dispose of it, *e.g.*, at death. DE FUNIAK §§ 198-99.

Equally unavailing is the argument that the right to a share at divorce makes her a co-owner because the statute granting it is mandatory. Besides the fact that she could get much less than one-half and perhaps nothing, the mere fact it is mandatory that the court give her some of her husband's property does not give her the rights of control and disposition that *Davis* demands.

[148] It has been argued (*e.g.*, by Gunn, *supra* note 3, at 249 n.87) that because the quantum of a wife's share upon divorce in a common law property state is subject to the discretion of the court should not cause a different tax result than a divorce in a community property jurisdiction, since several of those states have similar provisions. *See* DE FUNIAK § 227. *Davis* implied that the discretion granted the trial court was inconsistent with the notion the wife was a co-owner. 370 U.S. at 70. *See also* note 94 *supra*. It is submitted that, while a discretionary division would seem inconsistent with the concept of co-ownership in either jurisdiction, there is nevertheless a fundamental difference between the two situations.

In common law property states the existence of a court's discretionary power to divide the husband's property is reflective of the fact that his wife never had a vested interest therein, and that whatever interest she will receive is dependent upon the discretion of the court. "What [she will receive] might be ascertained independently of the extent of

held, such rights impose a burden upon the property of her husband, but hardly make her a co-owner thereof. A state's declaration, as in *Imel* or *Collins II*, that she is theoretically a co-owner but without the rights of one is a "theoretical protestation"[149] that she ought to be viewed as a co-owner for tax purposes despite the true nature of her rights. The state's label fails to prevent the tax imposed by *Davis* because it fails to make her a true co-owner. For that reason it does not seem unfair[150] to tax the husband, who, like Mr. Davis, has his property to himself but alleges his wife owns it too. Why should he have it both ways?

The *Davis* criteria—a descendible property right not subject to the discretion of a court and which a wife may manage and dispose of—have traditionally been lacking in common law property states. At one time *Davis* could be criticized[151] because

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the husband's property" (370 U.S. at 70), *i.e.* without reference to a fixed percentage of whatever her husband owned.

On the other hand, in community property jurisdictions both spouses are viewed as having vested one-half interests in the community property. *See* note 36 *supra*. A court's discretion in making a division of property between them is therefore not reflective of the fact that a wife has no interest in the community property until a discretionary award is made by the court. Instead, the court's discretion can be viewed as its power to divest either spouse of part of his one-half interest should the court make an unequal division because of fault, financial condition, etc. This is supported by the fact that in New Mexico and Louisiana the community property must be equally divided. DE FUNIAK § 227, at 515. In New Mexico it has been held that, absent a statute authorizing a court to make an unequal division thereby divesting a spouse of a portion of his one-half, the court has no such power. Beals v. Ares, 25 N.M. 459, 499, 500, 185 P. 780, 793 (1919).

[149] This term was used by Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 827 n.116 (1943), in describing the recently enacted and since repealed Oklahoma community property statute. Cahn noted that the wife's very limited power of control and disposition over community property was difficult to reconcile with the concept of community property and with the "theoretical protestation" of the statute that each spouse had a vested one-half interest therein. He further stated that "[w]henever the local statute appears to be inspired by the objective of special tax privileges, unrelated to historic institutions of the state, it must be examined with a high measure of skepticism." *Id.* at 828. Perhaps the same could be said of *Imel* and *Collins II*.

The term "amiable fiction" was used by Justice Sutherland in Tyler v. United States, 281 U.S. 497, 503 (1930), to describe the common law notion that at death no transfer, and hence it was argued no taxable transfer, occurred between husband and wife holding property as tenants by the entirety. The taxpayer's argument was unsuccessful for reasons not relevant here, but the language aptly describes the fiction that no transfer occurs in Colorado or Oklahoma divorce property settlements because the wife is already a co-owner of the property.

[150] At least it has not seemed so unfair as to persuade Congress to change the result. One draft of a statute which would do so has been available since 1954. *See* ALI FED. INCOME TAX STAT. § 257(a)(Feb. 1954 Draft).

[151] *See, e.g.*, Gunn, *supra* note 3, at 250-51.

a wife's power to manage and dispose of her interest was also lacking in the eight[152] community property states. Yet husbands in those states received favorable tax treatment. It appears, though, that in community property states there is a definite trend toward making a wife a true co-owner. Common law property jurisdictions suffer by comparison.[153]

It has been asserted that the fairest regime of marital property is community property.[154] In that system both spouses are recognized as equal partners and true co-owners. If Colorado and Oklahoma wish to benefit husband/taxpayers in their states upon the theory that husband and wife are co-owners of marital prop-

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[152] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. DE FUNIAK § 1, at 1. While the wife's control and ability to dispose of her interest were determinative in *Davis*, it might also be pointed out that there are other matters which may be equally important such as her liability for debt. *Id.* § 94, at 235.

[153] Texas, for instance, has allowed joint management of community income which is commingled. TEX. FAM. CODE ANN. § 5.22(b) (1971). A recently enacted statute in Washington requires joint action to convey or encumber community property. WASH. REV. CODE ANN. § 26.16.030 (1974). *See generally* Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729 (1974). California and Idaho have gone further than joint management and control, placing the power of management and control of all community property in both spouses. CAL. CIV. §§ 5125, 5127 (West Supp. 1975). *See* Note, *Equal Managment and Control Under Senate Bill 569: "To Have and to Hold" takes on New Meaning in California*, 11 SAN DIEGO L. REV. 999 (1974). *See also* Glendon, *supra* note 35, at 38-39. The significant changes in Idaho are contained in IDAHO CODE § 32-912 (Supp. 1975):

> Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated.

See Young, *Joint Management and Control of Community Property in Idaho: A Prognosis*, 11 IDAHO L. REV. 1 (1974).

[154] Sassover, *Matrimonial Law Reform: Equal Property Rights for Women*, 44 N.Y. STATE B. J. 406, 408 (1972). This is not to say that community property is without faults. *See, e.g.*, Younger, *Louisiana Wives: Law Reform to Their Rescue*, 48 TULANE L. REV. 566 (1974), and Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973). *See* Glendon, *supra* note 35, at 38-39 for a recent discussion of property law reform in favor of a wife in community property states.

erty, the proper method would be to make them so. *Imel* relies upon the theory that husband and wife are co-owners, but ignores the fact that in Colorado they are not.

Danny C. Aardal

BOOK REVIEW

PATENT LAW FUNDAMENTALS by PETER D. ROSENBERG, *Clark Boardman Co., Ltd., 1975, Pp. 405. $25.00*

Mr. Rosenberg, a patent examiner in the U.S. Patent and Trademark Office, has authored numerous book review articles for the *Journal of the Patent Office Society*. He is a member of the New York Bar and holds a Bachelor of Arts degree and a Bachelor of Chemical Engineering degree from New York University, a Juris Doctor degree from New York Law School and a Master of Laws in Patent and Trade Regulation degree from George Washington University.

With such impressive credentials one might possibly assume Mr. Rosenberg's book to be directed primarily to the academic community and to be primarily concerned with esoteric areas and issues of patent law. Such is not the case. *Patent Law Fundamentals* is truly a well written and easily understood book on fundamental patent law and the flavor of the book is one for non-patent lawyers, scientists and businessmen alike to enjoy.

Mr. Rosenberg has sectioned the book into six major parts. The first part presents the elementals and basis of patent law. The second part sets forth the statutory requirements for obtaining a patent. The third analyzes the priority of rights when more than one inventor claims rights to the same patent. Part four provides the procedure necessary for preparing and prosecuting a patent before the Patent and Trademark Office. Part five discusses patent exploitation including licensing and infringement problems. Finally, part six examines patents in an international context. Each of the above parts is logically set forth with a lucid discussion. The text is further accompanied by a thorough table of contents, an extensive 16-page table of cases and a comprehensive 16-page index. Rosenberg's style of writing is such that one not familiar with patent law can readily grasp the concepts.

A minor flaw in Mr. Rosenberg's book is the apparent lack of rigor in proofreading, indexing, and, most important, accuracy in footnoting.[1] Such annoyances as "exhausting" for "exchang-

[1] More significant errors are found in the Table of Cases. For example, *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) is cited to 305 U.S. 11. Also, *Luckett v. Delpart, Inc.*, 270 U.S. 496 (1926) is cited with a 1928 date. The reviewers did not exhaus-

ing" must be eliminated. The table of cases is not consistently alphabetical, for example, "Butt Technical", "Broderick", "Branch" appear in reverse alphabetical order. In addition, certain cases listed in the text do not appear in the table of cases. These criticisms, however, are trivial compared to the overall value in general patent knowledge the book imparts to, for example, a lawyer engaged in general practice.

Patent Law Fundamentals is an excellent initial research source for access into patent law precedent when a more detailed understanding of the legal problems is desired. Fortunately, Mr. Rosenberg has provided parallel cites to the West Reporter System (available to all practitioners) and to the BNA *Patent Quarterly* (used primarily by patent, trademark, and copyright attorneys). *Patent Law Fundamentals* is timely and fulfills a much needed void in patent legal literature for lawyers.[2] The book should remain timely since provision has been made for annual pocket part supplements.

Most lawyers embrace both a fear and an ignorance of patent, copyright, and trademark situations. Mr. Rosenberg's book dispels any such fear at least for patent law. A good casual reading of this book should enable any lawyer to advise his client as to the fundamentals of patent law, the basic procedures for obtaining a patent, and the means to exploit the invention. Of course, a lawyer not admitted to the bar of the U.S. Patent and Trademark Office cannot prosecute the patent for the client. Rather, he must refer the client to a patent attorney or agent.

In conclusion, the reviewers highly recommend *Patent Law Fundamentals* as an essential reference in a general practitioner's library. But our recommendation is only for a subsequent corrected printing or edition in hopes that the numerous accuracy problems will be corrected by the author.

Donald M. Duft and Robert C. Dorr***

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tively analyze the technical accuracy of the author's Table of Cases, but uncovered the above on a superficial inspection.

[2] Another very good review book is Paul Goldstein's work, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES (1973).

* Patent Attorney, Boulder, Colorado; B.S., 1949, Illinois Institute of Technology; LL.B., 1953, New York University; LL.M., 1971, New York University.

** B.S., 1968, Milwaukee School of Engineering; M.S., 1970, Northwestern University; J.D., 1974, University of Denver.

BOOK REVIEW

COURT REVIEW OF PATENT OFFICE DECISIONS: COURT OF CUSTOMS AND PATENT APPEALS, VOLUMES 4 & 4A OF PATENT LAW AND PRACTICE SERIES BY DONALD R. DUNNER

New York: Matthew Bender Co., 1973. Volume 4: Pp. xxxiv, 481; $50.00; Volume 4A: Pp. x, 645; $50.00.

Volumes 4 and 4A, *Court Review of Patent Office Decisions*, were first conceived in a limited-enrollment, intensive seminar sponsored by the National Law Center of the George Washington University, and were designed to provide the patent practitioner with a comprehensive and practical view of the formalized procedures involved in patent office decisions from the decision of the Board to the final decision in the Court of Customs and Patent Appeals. The author has provided the specialized practitioner in patents and trademarks law with one of the most detailed and explicit collections of substantive and adjectival presentations it has been the pleasure of this writer to read and review.

Layout of the Volumes 4 and 4A exemplify the concern and sympathetic dedication of the author to the pressing needs of that select group of practitioners before the Court of Customs and Patent Appeals. The author exhaustively surveyed and sorted the most varied and effective documents and pleadings with the assistance and cooperation of practicing attorneys, judges, and other officials of the Court of Customs and Patent Appeals; the distillation of what amounts to a formidable total of manhours and assiduous research and effort has been sorted, capsulized, and reproduced in a narrative and positive way.

For example, the lead pages of Volume 4 provide the practitioner with a correlation table between CCPA rules revised as of May 18, 1972 and the new rules effective January 1, 1974. In and of itself, such a table is rather plodding and mechanical. The table, though, is followed by a commentary on the new rules, which is valuable in updating those practitioners accustomed to the 1972 rules by pointing out at each step of the way the expansion effected by the 1974 rules and the detailed effects of such expansion. The commentary is exceptionally clear and complete, and is indeed a model of the kind of legal literature that lawyers could and should expect when substantial changes in substantive law or procedure come into being, and are superimposed upon the basic purview of knowledge that a professional of average skill in the field is supposed to have mastered.

The works restrict themselves to practices and procedures on appeals from patent office decisions in (1) Ex parte patent decisions of the Board of Appeals of the Patent Office, 35 U.S.C. § 141-145; 28 U.S.C. § 1542; P.O. Rules 301-304; (2) Inter partes Patent Decisions of the Board of Patent Interferences, 35 U.S.C. § 141-144, 146; 28 U.S.C. § 1542; P.O. Rules 301-304, 42 U.S.C. § 2182, 2457; and (3) Ex parte and inter partes trademark decisions of the Commissioner and Trademark Trial and Appeal Board, 15 U.S.C. § 1071; T.M. Rules 2.145, 2.119; 28 U.S.C. § 1361, 1542.

Volumes 4 and 4A are obviously designed for those members of the profession who are presently engaged in, or by necessity compelled to, practice before the Court of Customs and Patent Appeals. The volumes' orientation towards and value to the pressed and harried practitioner can perhaps be best exemplified by the arrangement of the volumes: Substantive comment is followed immediately in each chapter by a complete collection of exceptionally well drafted forms for the execution and implementation of the substantive points discussed. In Volume 4 for example, the table of forms itself occupies 17 pages. If one pursues this table to a particular form one finds a complete and impressively concise legal document for almost any situation one can imagine that might arise in a CCPA appeals situation.

Volume 4 initially discusses ex parte patent appeals, and discusses in detail the procedures of the patent office, including step by step chronologies, pleadings, documents, and fees. The next chapter reviews ex parte patent appeals and preliminary procedures in the Court of Customs and Patent Appeals and covers, once again, the kinds of details, such as forms, fees, printing, and the like, that many attorneys have, hat in hand, sought ad hoc from the ministerial functionaries of the multitudinous courts of record throughout the land.

Chapter 4 commences with a rather concise substantive discussion of motions practice, followed by some extensive motions documents illustrating the substantive introduction. Chapter 5 deals with the hearing and decision elements of ex parte patents appeals.

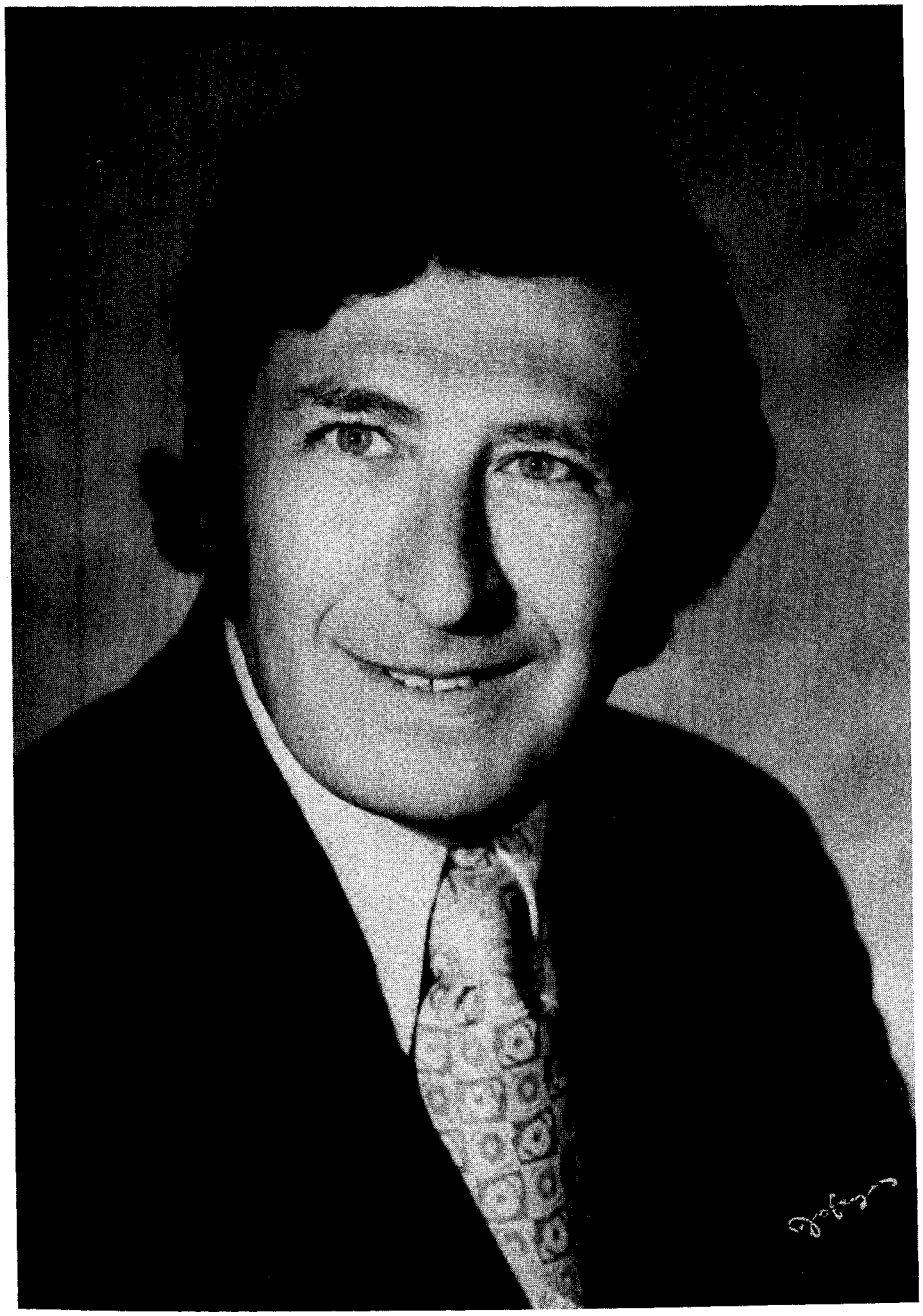
The denouement of this esoteric but delightful insight into a very sophisticated and unique area of practice continues in Volume 4A with chapter 6 where the inter partes appeals and the

Board of Patent Interferences is illustrated and described in an unusually thorough appraisal. Chapter 7, entitled "Appeals in Trademark Cases," may have an appeal to members of our profession who are not members of the Patent Bar, but who have developed or have been visited with a number of clients in the less scientific and more pragmatic field of unfair trade practices. In this chapter once again, the author has assembled a remarkable and admirable sequence of substantive narrative followed by crisp and detailed examples of practice documentation. Chapter 8 has the delightful title of "Miscellaneous Matters" and presents practical solutions for clients' problems and settlement negotiations, including comparative factors such as costs, time delays, ease of presentation, the effect of res judicata, and, not to be totally ignored, fees. The final chapter of Volume 4A sets forth the texts of statutory provisions and patent office and court rules relating to review of patent office decisions.

The sequence of matters presented in these two volumes is well arranged in a logical scheme, well indexed and explained, with a minimum of "fog count." The author has demonstrated unusual concern and scholarship in providing a reference work so complete and detailed that it would appear to constitute both an advanced primer for the infrequent petitioner before the Court of Customs and Patent Appeals, and a reliable refresher and reference source for the professional who appears before that body with regularity.

Christopher H. Munch *

* Dean and Professor of Law, University of Denver.



Eli Jarmel

DEDICATION

ELI JARMEL